Proximate Cause and the Pennsylvania Supreme Court: Twenty-Five Years in Review

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PROXIMATE CAUSE AND THE PENNSYLVANIA SUPREME COURT: TWENTY-FIVE YEARS IN REVIEW

I.

INTRODUCTION

It is hornbook law that a plaintiff seeking to recover damages for his injuries must prove not only the negligence of the defendant, but also that the latter’s substandard conduct was the “proximate cause” of his injuries. This term, coined by Lord Bacon in his Maxims of the Law, has been the object of extensive discussion on the part of judges and legal writers. The purpose of this comment is not to define a priori “proximate cause” in the abstract, but to investigate the cases decided by the Supreme Court of Pennsylvania in the past twenty-five years with the hope that some basic principles and a sense of direction can be gleaned therefrom, in order to extrapolate a functioning model of the proximate cause factor in its workaday setting.

II.

IN GENERAL

Pennsylvania subscribes to the fault theory of recovery in negligence cases. By this doctrine a person is held accountable for the damages his conduct has wrought upon another when he has acted below the standard imposed by the law on a fictional reasonably prudent man. But, since the consequences of an act are virtually infinite in the physical sense, there is a general feeling that to impose liability for all the harm an actor’s conduct has in fact caused would be to harness him with a crushing financial burden. To achieve a balance between making the actor responsible for the harm occasioned by his default and not placing an insurmountable onus upon him at the same time, the courts have developed the principle that a negligent actor is responsible only for the harm proximately caused by his activity. The use of this term is unfortunate, however, because linguistically it implies a requisite of nearness in time and space between the injury and its cause; this literal interpretation has in practice been almost completely

1. In jure non remota causa, sed proxima, spectatur. [In law the near cause is looked to, and not the remote one.] It were infinite for the law to judge the cause of causes and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree. BAC. MAX., reg. 1., quoted in Broome, Legal Maxims (8th Am. ed. 1887).
2. For a sampling of the multitude of articles and comments on this subject see Harper & James, Torts, 1109 n.4 (1956). See generally, Green, Rationale of Proximate Cause (1927); Harper & James, op. cit. supra 1108–61; Keeton, Legal Cause in the Law of Torts (1963); Prosser, Torts 252–82 (2d ed. 1955).
disregarded. In order to avoid linguistic detours into the realm of Platonic ideals, therefore, the best approach may be not to define the concept in terms of what it is, but to examine what the courts do with it functionally, and that is to set the outside limit on liability for negligence which has previously been found to exist, and which in fact caused the injury complained of.

III.

Cause in Fact

At the outset, before the issue of proximate or legal cause arises, defendant's negligent conduct must be shown to have been an actual cause of plaintiff's harm. Usually the plaintiff establishes a cause in fact relationship by presenting facts which indicate a negative answer to the following question: would the injury suffered have been sustained "but for" the defendant's negligence? Of course, how much evidence plaintiff must produce before a jury may reasonably find that defendant's conduct was the actual cause of plaintiff's injury is a question of law; whether it was the actual cause, assuming there is sufficient evidence, is a question of fact. Even so, it may sometimes happen that appellate courts reverse findings of the fact of actual causation by juries, not by questioning the sufficiency of the evidence of actual cause, but by treating the question as one of proximate rather than actual causation. And it is axiomatic that proximate cause is a question of law.

In a line of cases of which Wisniewski v. Chestnut Hill Hosp. is typical, the defendant's alleged negligence was the violation of a statute or ordinance designed to set a standard of care for the protection of others. In that case plaintiff tripped as she started down a stairway in defendant's hospital. She grabbed for the handrail on the left, but missed it and then attempted to break her fall by catching hold of the handrail on the right side. There was none, and in this respect defendant had violated the building code. There was evidence that plaintiff had looked down and had seen the stairs before commencing her descent, but had misjudged the distance and had overstepped. The court held that the absence of the handrail was

7. E.g., Simon v. Hudson Coal Co., 350 Pa. 82, 38 A.2d 259 (1944). There a child fell into a watercourse and was drowned. Defendant had pumped water into the stream, but had not given notice of its intention to the lower riparian owners. On appeal from a non-suit, the court was of the opinion that even if the defendant could be assumed to be negligent, the fact that the accident would have taken place anyway was sufficient to show no causal connection. Accord, Washburn v. Brunswick Hotel, Inc., 366 Pa. 463, 77 A.2d 357 (1951) (no causal connection between failure to give stop signal and ensuing accident); Harrison v. City of Pittsburgh, 353 Pa. 22, 44 A.2d 273 (1945) (alternative holding) (elevated manhole cover not causative factor where plaintiff slipped on, rather than tripped over it); see also McIntyre v. Pope, 326 Pa. 172, 191 Atl. 607 (1937), where plaintiff was denied recovery for injuries sustained in an accident on the basis of his contributory negligence. This case was later interpreted in McClelland v. Copeland, 355 Pa. 405, 50 A.2d 221 (1947), to mean that there must be a causal relation between contributory negligence and the accident.
not the proximate cause of plaintiff’s fall and that the violation of an ordinance was not a ground for recovery unless it was the proximate cause of the injury. In passing, the court discounted as being without merit the plaintiff’s contention that the dimly lit condition of the stairway was the cause of her fall, a finding apparently proper in view of the evidence that she had looked and seen the stairs before starting down. A similar finding in the case of Loeb v. Allegheny County cannot be so justified. There the plaintiff slipped on the stairs in defendant’s courthouse and claimed that the lack of a side light in the stairway was the cause of his mishap. The court assumed that the light was out for a sufficient time to require sending the question of negligence to the jury, but then concluded that the proximate cause of the fall was the plaintiff’s act of slipping on a liquid spot on the step. A questionable result indeed, but even more questionable is the use in this type of case of the term “proximate cause” when what is apparently meant is that the aspect of defendant’s total conduct which is said to be negligent was not the cause in fact of the plaintiff’s injury. Indeed, in both cases the real question seems to have been: could a reasonable jury have found that the absence of the right hand rail or the absence of a light was the actual cause of the fall?

As mentioned at the beginning of this section, the plaintiff can generally sustain his burden of proof on the causation aspect of his case with the use of the “but for” test. There is one instance, however, when the formula leads to an unwarranted result, and that occurs where defendant’s negligence combines with another force which alone would be sufficient to bring about the damage to plaintiff. If the “but for” question is asked, the affirmative answer would relieve the defendant from liability because plaintiff’s injury would have been sustained regardless of defendant’s wrongful conduct. In such cases a different test is applied, and its stated purpose is to ascertain whether the negligence of the defendant was

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11. Accord, Kaplan v. Kaplan, 404 Pa. 147, 171 A.2d 166 (1961) (plaintiff struck by trolley as he walked from behind illegally parked truck); Klimczak v. 7-Up Bottling Co., 385 Pa. 287, 122 A.2d 707 (1956) (plaintiff was crushed between his vehicle and illegally parked truck); Ferne v. Chadderton, 363 Pa. 191, 69 A.2d 104 (1949) (whether failure to put out flares was proximate cause of ensuing accident was found to be a question for the jury); Ennis v. Atkin, 354 Pa. 165, 47 A.2d 217 (1946) (parking too close to fire hydrant not legal cause of death resulting from collision); Landis v. Conestoga Transp. Co., 349 Pa. 97, 36 A.2d 465 (1944) (whether speed violation was proximate cause of injury was found to be a jury question); Hutchinson v. Rollmer Trucking Co., 333 Pa. 424, 5 A.2d 182 (1939) (plaintiff must prove that the absence of rear identification light was the proximate cause of an accident); Miller v. Gutherie, 325 Pa. 495, 191 Atl. 61 (1937) (“semble”) (plaintiff struck by truck which had passed the barricade marking detour); see also Little v. Straw, 326 Pa. 577, 192 Atl. 894 (1937), where the court indicated that to deny plaintiff his right of recovery it must be shown that the absence of headlamps on which his contributory negligence was based was a proximate or efficient cause of the accident. See McIntyre v. Pope, 326 Pa. 172, 191 Atl. 607 (1937).


14. See notes 7 & 10 and accompanying text.
a "substantial factor" in bringing about harm to the plaintiff. If this is found to be the case, then liability attaches regardless of the fact that the concurring cause was an act of God over which defendant had no control. Here too the court has spoken in terms of proximate cause when it seems clear that what was intended was causation in fact.

IV.

natural and probable consequences

Once negligence and causal connection have been established, the court is faced with the problem of determining proximate or legal cause. The issue is whether the negligence of the defendant occupies such a relation to the harm suffered by plaintiff as to require that defendant be visited with legal responsibility for the result. If the answer is affirmative, then his negligence is termed a proximate or legal cause; if the answer is negative, then his conduct is said to be merely a remote factor in bringing about the injury. The question itself is one of policy for the court to answer as a matter of law, and its final determination will depend on which of several views on the extent of liability the court chooses to accept.

One view is that a defendant is liable only for the natural and probable consequences of his wrongful conduct. This test starts with the result and questions whether, under the surrounding circumstances of the case, it was such a consequence as might and ought to have been foreseen by the defendant as likely to flow from his negligent act. Thus, foresight serves a dual purpose. It initially enters into the determination of whether any harm of a general character was foreseeable with respect to plaintiff, thereby imposing upon defendant the duty to act accordingly. After a duty and the breach thereof has been established foresight again enters to test the extent to which defendant will be held accountable for his wrongful act. Despite language to the contrary, the foreseeability test was in use in Pennsylvania at the beginning of the period under investigation.

The case of Irwin Sav. & Trust Co. v. Pennsylvania R.R. decided in 1944, was a wrongful death action arising from the drowning of four children who had fallen through ice which had formed on a pond created by backed up water from a blocked culvert. There was evidence presented that defendant's employees had knowledge that children were in the habit

15. For a list of the factors taken into consideration when ascertaining what is a substantial factor see Restatement, Torts § 433 (1948 Supp.).
17. See Posser, op. cit. supra note 2, at 281–82.
19. Shipley v. Pittsburgh, 321 Pa. 494, 184 Atl. 671 (1936). The suit was against the city of Pittsburgh growing out of an alleged failure of construction and maintenance of a guard rail on a bridge from which the driver of a motor vehicle and his guest fell to their injury. The court held that the city was required to keep its bridges in reasonably safe condition for public travel, and having failed to do so it was liable.
of playing around and upon the pond. The defendant admitted the negligence of its servants in not clearing the debris from the culvert, but contended that the children's death was not the natural and probable consequence of its negligence. The court agreed, and while recognizing the fact that the defendant might successfully have argued that it owed no duty to the children and was therefore not negligent toward them, chose to base its decision on the lack of proximate cause. The position of the court was that it would be too much to suppose that a reasonable man could have anticipated that the children would run upon the ice to retrieve a kite which had become entangled in a tree near the center of the pond, and that the ice would break causing the tragedy which followed. The majority was of the opinion that the actions of the children themselves in going out on the ice was the proximate cause of the misfortune. This position seems untenable, since if there was negligence as admitted by defendant then the sortie onto the ice would appear to be clearly within the risk which flowed from the negligence. Chief Judge Maxey quite properly took his brethren of the majority to task for holding that the exact nature of the occurrence must be foreseeable. 21 He saw the issue as whether defendant could have reasonably anticipated that some child or children would meet with either serious injury or death while playing around this pond created by the railroad's neglect. He thought the jury fully justified in finding that the defendant should have anticipated the misfortune which could easily have been prevented by the expenditure of a trifling sum of money.

Time has proved Judge Maxey's dissent to be prophetic for within two years a series of cases commenced to impose inroads upon the Irwin decision which ultimately led to its repudiation. 22 In arriving at this

21. Id. at 290, 37 A.2d at 437. In the English case of Hughes v. Lord Advocate. (1963) 1 All E.R. 705, a minor plaintiff was injured when he fell into an open manhole left unattended by post office workmen. A number of paraffin warning lamps had been placed around the outside of a tent erected over the hole, and the plaintiff knocked one of these into the pit while playing in and around the temporary structure. The leaking paraffin created a vapor which exploded and caused the plaintiff's fall. On appeal from a denial of recovery, the House of Lords recognized the foreseeable danger created by the workmen in that the plaintiff may fall into the hole, or receive burns from the lamps or both. The uniqueness of the actual occurrence led Lord Pearce to remark: "In the case of an allurement to children it is particularly hard to foresee the exact shape of the disaster that will arise. . . . Did the explosion create an accident and damage of a different type from the misadventure and damage that could be foreseen? In my judgment it did not." Id. at 715.

22. Hawkins v. Mack, 364 Pa. 417, 72 A.2d 268 (1950). Deceased was run over by defendant's truck. Immediately after the accident the footbrake of the truck was found to be defective. After stating that the jury was warranted in finding that the accident was caused by inattentiveness or poor brakes, or both, the court cited section 435 of the Restatement of Torts and the Shipley case as controlling. In Straight v. B. F. Goodrich Co., 354 Pa. 391, 47 A.2d 605 (1946), the deceased was found lying face down in an elevator which he was repairing and which was below the floor level at the time. On top of him was a radiator which had been in close proximity to the elevator shaft. Finding a duty owed to deceased because the radiator constituted a hidden menace which the defendant was obligated either to make safe or disclose, the court concluded that liability attached. This was so regardless of whether the defendant, in creating the dangerous situation, may not have foreseen the exact manner in which deceased would be injured. The earlier case of Quigley v. Delaware & H. Canal Co., 142 Pa. 388, 21 Atl. 827 (1891), was cited to the effect that the defendant
reputation the court relied heavily on the *Restatement of Torts*, section 435\(^2\) which states in substance that once it is shown that the defendant's negligence was a substantial factor in bringing about the harm, it is of no moment that he neither foresaw the extent of the harm, nor the manner in which it occurred. In 1951 the death knell for the *Irwin* rationale sounded loudly in the case of *Dahlstrom v. Shrump*.\(^2\) Plaintiff sustained injuries when the body of a person struck by defendant's car was thrown against her. Both plaintiff and deceased had alighted from a bus and were walking from behind it at the time defendant, coming from the opposite direction, passed the vehicle. The road was not well lighted and defendant testified that he was unaware of the nature of the vehicle he was passing. The court held that plaintiff was outside the ambit of the risk so that even if a duty could be found to exist with respect to the deceased who had passed from behind the bus, none existed as to the plaintiff since the defendant could not foresee (in the negligence sense) that an object he would hit would be thrown against her.\(^2\) Thus, having decided the case on the basis of defendant's lack of duty, the court went on to clear up the confused state of the law which existed because it had never expressly overruled *Irwin* and the cases cited therein. The court placed itself in accord with the doctrine that foreseeability has no place in the consideration of proximate or legal cause however indispensable it may be when the question of legal duty is at issue.

A caveat should be made at this point. While *Dahlstrom*, section 435 of the *Restatement of Torts* and subsequent cases\(^2\) have abrogated the use of foresight on the issue of proximate cause, that repudiation applies only when the manner of occurrence of the accident or the extent of the injuries is under consideration.\(^2\) Foreseeability continues to enter the

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23. This section has since been amended so that the language referred to in these cases is presently found in *Restatement, Torts* § 435 (1) (1948 Supp.).


25. It is interesting to note that a similar fact situation in the case of *Wood v. Pennsylvania R.R.*, 177 Pa. 306, 35 Atl. 699 (1896), was resolved on the basis of proximate cause. The difference in approach by the court is due, in no small part, to the holding in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), where Judge Cardozo defined the scope of the duty owed by defendant as commensurate with the orbit of the risk his conduct has created. It is submitted that this is a more realistic and preferable technique for handling most of the problems hitherto dealt with under the aegis of proximate cause. See, *e.g.*, *Zilka v. Sanets Constr., Inc.*, 409 Pa. 396, 186 A.2d 897 (1962); *Helm v. South Penn Oil Co.*, 382 Pa. 437, 114 A.2d 909 (1955); *Jowett v. Pennsylvania Power Co.*, 383 Pa. 330, 118 A.2d 452 (1955); *Rockey v. Ernest*, 367 Pa. 538, 80 A.2d 783 (1951); *Leoni v. Reinhard*, 327 Pa. 391, 194 Atl. 490 (1937).

26. *Diakolios v. Sears, Roebuck & Co.*, 387 Pa. 184, 127 A.2d 603 (1956) (a fall down escalator brought about by slipping on banana peel while attempting to avoid grease spot); *Churbuck v. Union Ry.*, 380 Pa. 181, 110 A.2d 210 (1955) (plaintiff was hit by steel sliver caused by defendant's servant striking rail with pick axe); *Vereb v. Markowitz*, 379 Pa. 344, 108 A.2d 774 (1954) (deceased was hit by one car and propelled into path of another whose driver was violating speed limit).

discussion when the court is weighing the effect of intervening causes on
the extent of defendant's liability.28 Worthy of note also, is the fact that
since the Dahlstrom case, the court has shown a tendency to extend defen-
dant's liability to those consequences which proceed in the nature of events
from his negligent conduct.29 In this respect the court has aligned itself
with the holding in the English case of In re Polemis30 where the defendant
was held responsible for the entire damage that resulted when a negligently dropped plank ignited benzine vapors which were present in
the hold of a ship. Although the dropping of the plank was negligent,
the worst result that could have been foreseen was that it would strike
a ship's hand. But the Court of Appeal was of the opinion that since the
defendant's servant created the risk of injuring the ship itself, liability
extended to all the direct consequences of the conduct.

There is an element of paradox here. True, Pennsylvania has been
faithful to the spirit of the Palsgraf31 rule that duty hinges on the question
of whether defendant ought to have foreseen a risk of harm to plaintiff. But
Pennsylvania apparently did not, as did Judge Cardozo in Palsgraf, assume
that the Polemis rule was in vogue. Instead, in measuring the extent to
which defendant was liable for the harm his breach of duty had caused, the
court again used the notion of foreseeability. Interestingly enough, just at
the time Pennsylvania has reverted to the Polemis rule, the English courts
have switched to the foreseeability test.

The Pennsylvania Supreme Court has not, however, entirely elimi-
nated the possibility of a cut-off point for financial responsibility, and
in 1954 the hindsight test of the Restatement of Torts section 435(2)32
was utilized. In Roadman v. Bellone33 plaintiff was injured when, after
colliding with a police car, his vehicle came in contact with a utility pole
causing a transformer to fall on him. A compulsory non-suit in favor of
the electric company was entered. The plaintiff appealed raising the
question of whether, assuming the electric company was negligent in the
maintenance of the transformer, that negligence was the proximate cause
of his injury. The court discussed the rules applicable to intervening causes
and then cited section 435(2) to the effect that an actor's conduct is not
the legal cause of harm where, after the event and looking back from the

28. This topic is discussed more fully in section IV infra.
was injured when she was struck by a car after being let off defendant's trolley a
distance of ninety feet from the regular stop. Defendant denied its negligence, but
argued that even if it were negligent, such wanton conduct was not the proximate
cause of plaintiff's injury. The court held that the accident was a natural and con-
tinuous sequence unbroken by any superseding cause. Accord, Baer v. Hemlinger, 412
Dock & Engineering Co. Ltd. (The Wagon Mound), [1961] A.C. 388, where the
liability of defendant was extended only to that interest to which its conduct had
created a risk. While the Polemis case was not expressly overruled its rationale was
placed in question. The House of Lords subsequently accepted the foreseeability test
32. RESTATEMENT, TORTS (1948 Supp.).
harm to the defendant's conduct, it appears highly extraordinary that it should have brought about the harm.\textsuperscript{34} In view of all the facts of the case the court concluded that the manner of maintenance of the transformer on the pole was not a legal cause of the plaintiff's injuries. One is tempted to question the reasoning of this case in light of the fact that the risk inherent is not properly securing the transformer to the pole was that some force applied to the base of the upright would shake the object loose and injure someone below.\textsuperscript{35} Even the application of the foreseeability test would point in the direction of liability on these facts and as will be seen in the following section, the negligence of the driver of the police car would not per se insulate the defendant from liability.

V. \textbf{INTERVENING AND SUPERSEDING CAUSES}

In the normal course of events, man does not act in a vacuum, but upon a stage set with any number of conditions and forces all of which are influenced by, and combine with, his conduct to bring about a given result. To a particular segment of these forces, namely those which follow the negligence of defendant in point of time, the law ascribes the label intervening cause. Whether such a force will have the effect of superseding the actor's wrongful conduct, thus insulating him from liability, is another facet of the proximate cause concept. Here again the question has nothing to do with cause \textit{in fact} which must first be established, but involves policy considerations dealing with the extent of liability for negligence already found to exist. Viewing the question in this light, it becomes clear that the issue of proximate cause should not be raised in the area of intervening cause until the negligence of the defendant has first been dealt with. Given this formula, the result in cases similar to \textit{Shimer v. Bangor Gas Co.}\textsuperscript{36} becomes readily predictable. In that case the plaintiff sought recovery for property damage to a house which was demolished as the result of a gas explosion. The action was brought against a construction company alleging negligence on its part in breaking a gas pipe that led to houses on the street. Also joined as defendant was the utility company whose gas inspector had detonated the explosive substance by negligently striking a match in the gas filled cellar of the house next to plaintiff's. The construction company argued that even if it were negligent in breaking the main, this act of negligence spent itself with that untoward happening, and it was not responsible for what the preoccupied employee of the gas company did

\textsuperscript{34} See PROSSER, \textit{op. cit. supra} note 2, at 256-66, where it is suggested that since virtually all consequences would appear as proceeding in the nature of events to one endowed with hindsight, those results which are deemed to be extraordinary will be such that would be unforeseeable at the time the act was performed.

\textsuperscript{35} See \textit{Mars v. Meadville Tel. Co.}, 344 Pa. 29, 23 A.2d 856 (1942), where the force causing a utility pole to topple was supplied by a cow brushing up against it. The court held that since the defendant had created a condition which in the ordinary course of events would prove injurious to those in the path of the pole were it to be felled by some outside force, it was only natural and probable to expect that that force would be applied. The fact that the force was in the form of an animal was of no significant consequence.

\textsuperscript{36} 410 Pa. 92, 188 A.2d 734 (1963).
when he struck the match. The court refused to accept this argument and pointed out that the risk that someone or something would ignite the gas charged atmosphere was precisely within the risk that encompassed defendant’s negligence. On these same grounds, the court has denied a disclaimer of liability where someone provided a minor with a gun to shoot cartridges sold to him, failed to inspect a negligently constructed high pressure tank, released the brake on a railroad car parked on a siding, and inadvertently backed a truck into negligently exposed high tension wires. While the court has consistently spoken in terms of proximate or legal cause when dealing with these problems it seems plain that what was actually involved was an investigation of the risk which gave rise to negligence in the first place.

Slightly removed from this line of cases are those where the court, while not specifically dealing with the issue of defendant’s negligence, has applied the foreseeability test to determine the effect of an intervening force. Thus it has been held that a defendant should have anticipated the ordinary forces of nature such as wind or snow and will not be relieved of liability unless that force is extraordinary in occurrence or magnitude.

The same treatment has been given to the intervening conduct of others, be it innocent, negligent or criminal in character. On this

42. In Hudson v. Grace, 348 Pa. 175, 34 A.2d 498 (1943), a vent on the top of defendant’s steel mill emitted steam which the wind blew across a bridge reducing visibility thereon and causing an accident in which plaintiff’s decedent met his death. The court decided that the intervening agency of the wind should have been anticipated. Accord, Kimble v. Mackintosh Hemphill Co., 359 Pa. 461, 59 A.2d 68 (1948) (high wind blew off negligently maintained roof which hit decedent).
45. Polinelli v. Union Supply Co., 403 Pa. 546, 170 A.2d 576 (1961) (workman bumped plaintiff into negligently maintained register opening in a house she had come to inspect.)
46. Levine v. Mervis, 373 Pa. 99, 95 A.2d 368 (1953) (innocent defendant unable to avoid collision with another driver who had negligently entered center lane); Nathan v. McGinley, 342 Pa. 12, 19 A.2d 917 (1941) (unskilled treatment administered by surgeon selected with ordinary care); Nelson v. Duquesne Light Co., 338 Pa. 37, 12 A.2d 229 (1940) (negligence of driver who ran into utility pole maintained in the street was not so extraordinary that it became unforeseeable).
47. Anderson v. Bushong Pontiac Co., 404 Pa. 382, 171 A.2d 771 (1961) (plaintiff injured by teenager who returned to steal a car from which keys had been stolen two days before).
point the case of Malitovsky v. Harshaw Chem. Co.\(^48\) is illustrative. Plaintiff was injured when acid splashed on him while he was moving a drum belonging to the defendant chemical company from a common area shared by him and the codefendant carrier. The drum had been separated from the rest of the shipment because of the discovery of a tiny pin hole. It remained on the carrier's loading platform for an extended period of time after the chemical company had been notified of the defect. An employee of the carrier subsequently moved the receptacle to the alleyway and negligently placed it with the hole facing the wall. Desiring to clear the area, the plaintiff rolled the barrel toward him and sustained considerable injury when the acid gushed forth from the opening which had been enlarged by the action of the acid on the metal. The chemical company disclaimed liability for its negligence contending that the wrongful conduct of the carrier's employee was a superseding cause. The court denied the validity of this contention, and reaffirmed the rule that the intervening act of a third person, negligent itself or done in a negligent manner, does not inject it as a superseding cause of harm which the defendant's conduct is a substantial factor in bringing about. The jury was justified in finding that the defendant could have foreseen the consequences of its negligence. The fact that it could not anticipate the particular injury to this particular plaintiff would not absolve it from financial responsibility for the result.

But not every negligent act of a third person is to be anticipated by the defendant. The case of Hendricks v. Pyramid Motor Freight Corp.,\(^49\) decided by the court in 1938, focuses on this proposition. Plaintiff brought an action for the wrongful death of her husband who was drowned when the truck in which he was sitting was propelled off the front of a ferry boat. A tractor trailer had been negligently started by its driver while in gear. The truck lurched forward and rammed a car which is turn pushed the deceased's vehicle through the vessel's restraining barriers. Plaintiff claimed that the employees of the defendant ferry boat company had been negligent in not placing blocks under the wheels of the car, and also that the restraining apparatus was not strong enough to withstand the pressure applied to it. Assuming that the jury could find negligence on the part of the boat company, the court posed the question of whether the law should cast responsibility on it along with the defendant tractor trailer company. The answer, it concluded, depended on whether the driver's conduct was so extraordinary as not to have been reasonably foreseeable, and on these facts a proper appreciation of the recklessness of the act led it to the decision that it was. To the same effect is the more recent case of Guca v. Pittsburgh Ry.\(^50\) where a city gave inadequate warning of a pavement discontinuance as a result of which deceased's car became stuck on a set of trolley tracks. It was held that the city was not bound to foresee the extraordinary

\(^{48}\) 360 Pa. 279, 61 A.2d 846 (1948).
\(^{49}\) 328 Pa. 570, 195 Atl. 907 (1938).
\(^{50}\) 367 Pa. 579, 80 A.2d 779 (1951).
negligence of the trolley driver who failed to notice the deceased who was attempting to flag him down.

It is interesting to note that the cases setting forth the "extraordinary negligence" test have made increasing reference to the Restatement of Torts section 447\[1\] in the course of discussing superseding cause. In view of that section's liberal treatment of the conduct of others which should be anticipated by defendant, it would appear that no difference in the extent of liability exists between the cases involving intervening causes and those where the manner of occurrence or the extent of damages is at issue. Such a conclusion would seem to be inevitable were it not for the rather unique doctrine developed by the cases in the following section.

VI.
SHIFTED RESPONSIBILITY

The case of Kline v. Moyer & Albert\[2\] which came before the court in 1937, was a personal injuries action in which the plaintiff joined as defendants both the driver of a truck who left his vehicle standing upon the highway, and another driver who negligently pulled out from behind the truck and ran head on into the car in which plaintiff was a passenger. The jury returned a verdict against both defendants, but a judgment n.o.v. was entered for the truck driver even though his act of leaving the truck on the roadway violated a statute. On appeal, the court assumed that the truck driver was negligent and framed the following issue: whether such wrongful conduct should be considered a proximate cause of the injury or as having been superseded by the negligence of his codefendant, thereby insulating him from liability. To guide the jury on remand it set forth the test to be applied. In effect they were to determine whether the second actor had become aware of the potential hazard created by the negligence of the first, and with that knowledge had performed an independent act of negligence thereby reducing the prior negligence to the status of a mere condition, rendering it a remote rather than proximate cause of the injury. On the other hand, if the jury should find that the subsequent wrongdoer

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51. Restatement, Torts § 447 (1934):
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 response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

52. 325 Pa. 357, 191 Atl. 43 (1937).
did not become aware of the situation until his own negligence, when combined with that of the original tortfeasor, made the accident inevitable then both would be concurrent causes rendering them jointly and severally liable for the injuries sustained.\(^53\)

From the foregoing it becomes clear that if the alleged negligence of the second actor was his failure to perceive the dangerous condition which existed, then the negligence of the original wrongdoer will not be superseded. Such an observation is borne out by the case of Rodgers v. Yellow Cab Co.\(^54\) Plaintiff was injured when the wheels of the cab in which she was riding dropped into an excavation which had been dug by one defendant for another. The driver of the cab was also made a defendant, and a verdict was returned against all three. On appeal the court was of the opinion that the jury could find that the driver had been inattentive and therefore negligent, but that such a finding would preclude the conclusion that the negligence of the cab driver had superseded that of his codefendants.\(^55\)

While the test set forth in the Kline\(^56\) case is ostensibly one for the jury to apply,\(^57\) the court has not been adverse to substitute its judgment for that of the fact-finding body when the facts are not in dispute. For the most part such action has had the effect of declaring a number of causes to be concurrent ones,\(^58\) but on one occasion the outcome of this appellate second guessing resulted in denying recovery to a claimant who appeared clearly entitled to recover for her damages. In Listino v. Union Paving Co.,\(^59\) plaintiff sustained injuries when the car in which she was riding swerved from one side of a roadway into the opposite lane of traffic and was hit broadside by an oncoming vehicle. The accident took place at night, and the defendant who was in the course of repairing the highway had failed to give any notice whatsoever of the discontinuance of that portion of the pavement on which plaintiff's husband had been proceeding. Evidence was introduced to the effect that the driver had to fight the wheel

\(^{53}\) Id. at 364, 191 Atl. at 46.  
\(^{55}\) "[S]ince the cab driver's negligence is predicated upon his failure to use due care under the circumstances to observe the defect, it would be impossible to conclude that at the same time he had definite knowledge of this identical condition." Id. at 419, 147 A.2d at 615.  
\(^{56}\) 325 Pa. 357, 191 Atl. 43 (1937).  
\(^{57}\) Thus, the jury was instructed to apply the test set forth in the Kline case in: Jeloszewski v. Sloan, 375 Pa. 360, 100 A.2d 480 (1953) (C ran into the cars of A and B after A had caused an accident); Coleman v. Dahl, 371 Pa. 639, 92 A.2d 678 (1952) (passenger in B's car was injured when B negligently ran into A's train parked at crossing in violation of a statute); Bricker v. Gardner, 355 Pa. 35, 48 A.2d 209 (1946) (passenger in B's truck injured when B negligently collided with A's truck which was in no parking zone); Biehl v. Rafferty, 349 Pa. 493, 37 A.2d 729 (1944) (C killed when hit by B while standing behind A's bus whose driver had not given statutory warning); see also Brazel v. Buchanan, 404 Pa. 188, 171 A.2d 151 (1961). In Martin v. Arnold, 366 Pa. 128, 77 A.2d 99 (1950), the court held that the granting of a new trial to a defendant who had been found concurrently negligent was an abuse of discretion. Accord, Bum v. Fehlinger, 412 Pa. 406, 194 A.2d 893 (1963) (by implication).  
\(^{59}\) 386 Pa. 32, 124 A.2d 83 (1956).
for a distance of thirty feet while the car encountered a series of muddy ruts and that when he finally regained a position on the paved portion of the road the car made a 270 foot arc into the opposite lane.\textsuperscript{60} The jury returned a verdict for the plaintiff, but on appeal it was held that the conduct of the husband was a superseding cause rendering defendant's negligence merely a condition and thus relieving it from liability.\textsuperscript{61} The \textit{Kline} case was cited as controlling the result although, as the dissent filed by Justice Musmanno clearly points out, the majority had completely misapplied the test set forth in that case and had therefore overturned a proper verdict for plaintiff.

Adding to the semantic confusion that exists in this area of the law are those cases where the court has attributed to the conduct of the plaintiff himself the language applicable to superseding causes.\textsuperscript{62} While contributory negligence can usually be technically justified as falling within the scope of the language set forth in the \textit{Kline} case, it is submitted that the policy reasons for saying that an independent negligent act of a third person reduces the prior negligence of defendant to a mere condition should not be intermixed with those cases which deny recovery to the plaintiff when he himself has contributed to his own injury by some untoward conduct.

The doctrine of shifted responsibility is itself not entirely free from criticism and disfavor would especially seem appropriate in those cases where the second actor would be relieved from liability on some other grounds, or where his deviation from the standard of care is slight in comparison to that of the original tortfeasor. While the immunity is not as all pervasive as the formerly accepted "last human wrongdoer" rule,\textsuperscript{63} which placed complete liability on the last wrongdoer in point of time, it does have the same harsh effect in the instances where it is applicable.

\section*{VII. Conclusion}

The term proximate or legal cause defies exact definition and is perhaps best explained as the cut-off point of a wrongdoer's liability for

\textsuperscript{60} Id. at 35, 124 A.2d at 84.
\textsuperscript{62} In De Luca v. Manchester Laundry & Dry Cleaning Co., 380 Pa. 484, 112 A.2d 372 (1955), defendant's truck was parked across a sidewalk of a one way street. Plaintiff, who was walking along the sidewalk, saw the truck blocking her way and was hit by another vehicle when she attempted to avoid the obstruction by entering the street. The court held that even assuming the defendant to be negligent, the conduct of plaintiff herself was a superseding cause. \textit{Accord}, Zlates v. Nasim, 340 Pa. 157, 16 A.2d 381 (1940); Dooley v. Charleroi Borough, 328 Pa. 57, 195 Atl. 6 (1937).
\textsuperscript{63} Stone v. City of Philadelphia, 302 Pa. 340, 153 Atl. 550 (1931). This test has since been modified by the \textit{Kline} case and those cases where the \textit{Kline} test has been applied.
his negligence which has in fact caused injury to another. Keeping this description in mind it becomes evident that the Pennsylvania Supreme Court has created much confusion by speaking in terms of proximate cause when the real question at issue was something quite different. Important to note also is the fact that the meaning of the term will vary with the factual situation in which it is applied. In this respect the court has repudiated the "natural and probable consequences" formula in favor of the "direct consequences" test of the Restatement of Torts when the manner of occurrence or the extent of injuries is under consideration. In those cases where some other force has intervened between the negligence of defendant and the harm suffered by plaintiff, the court has continued to apply the foreseeability test, but has shown a tendency to accept the Restatement of Torts' very liberal definition of what forces and conduct should be anticipated by a defendant. For these he is held accountable except where they appear so extraordinary as to be termed unforeseeable, or where a second wrongdoer, after becoming aware of the hazardous situation created by the defendant's negligence, has nevertheless by his independent act of negligence brought about the injury to plaintiff.

The trend toward liberality on the scope of liability for wrongful conduct would appear to indicate a corresponding benefit to those who are injured through the conduct of others. It should be remembered, however, that the court has shown an increasing propensity toward the duty technique, and in all probability it will continue and expand this concept when treating problems that once were classified as questions of proximate cause. That is, having repudiated foreseeability as a limitation on liability, the court has become somewhat reluctant to find any liability at all.

It would appear, therefore, that the court has not settled upon any overall philosophy as to exactly what the risk principle of the law of negligence entails, since, quite obviously, the Polemis rule of proximate causation hardly fits into any well ordered system of risk analysis. Indeed, to a surprising extent the decided cases represent an affirmance of the principle that "there are no fixed rules."64 Thus, in the period of twenty-five years, dealing with the recurring problem of proximate cause, the court has not seen the forest because of the trees. In this, however, the court may not be atypical, since even a cursory reading of proximate cause cases from other jurisdictions indicates similar situations prevail generally. Since it cannot be assumed that the overwhelming number of American state courts suffer from intellectual failings, it would appear that the courts deliberately have refrained from systemizing the risk principle along the lines currently in vogue in England. Instead, Pennsylvania, like many other courts, has adopted as a working principle that the question is one of "common sense,"65 "fair judgment,"66 or, even "expediency."67 It may

65. Ibid.
66. Ibid.
67. Ibid.