

## COMMENTS

### INTERVENING NEGLIGENCE: THE NEGATIVE APPROACH TO THE PROBLEM OF LIABILITY

THE CONCEPT of proximate cause has been discussed and often ridiculed by legal writers for more than fifty years.<sup>1</sup> Yet, it continues to vex the field of negligence and there seems to be no relief in prospect.<sup>2</sup>

That facet of proximate cause which deals with intervening acts is responsible for much of the difficulty in this area of the law.<sup>3</sup> An intervening act is a cause which becomes operative in producing harm after the occurrence of the first actor's negligent act or omission.<sup>4</sup> Thus, in a typical situation, the negligence of *D* creates a dangerous condition, which is acted upon by *X* to produce harm to the plaintiff. Should *D* be liable for the resulting harm? The question is usually phrased in this manner: Should the intervening act of *D* be regarded as a "superseding" cause of the plaintiff's harm? The *Restatement of Torts*,<sup>5</sup> in labelling superseding cause as "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 . . .,"<sup>6</sup> merely restates the problem. Much may depend upon the nature of *X*'s intervening act. The problem is both interesting

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<sup>1</sup> See generally, Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369 n. 1 (1950), for an exhaustive list of important literature in the field of proximate cause prior to 1950. See especially, Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1228-32 (1937); Carpenter, *Proximate Cause* (pts. 1-9), 14 SO. CALIF. L. REV. 1, 115, 416 (1940); 15 *id.* 187, 304, 427 (1941); 16 *id.* 1, 61, 275 (1942); Green, *Merlo v. Public Service Co.—A Study in Proximate Cause*, 37 ILL. L. REV. 429 (1943); Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189 (1952).

<sup>2</sup> The conspicuous decline of leading articles on the subject during the past ten years supports the conclusion that scholars in the field of proximate cause have all but abandoned the ambitious efforts to promote reform, made during the period from 1920 to 1940. The great bulk of material written since 1950 comprises case notes and comments dealing primarily with the situation in a single jurisdiction.

<sup>3</sup> See generally, Carpenter, *Proximate Cause*, 16 SO. CALIF. L. REV. 61 (1942); 7 U. KAN. L. REV. 539 (1959); 47 MICH. L. REV. 1026 (1949); 19 TEX. L. REV. 93 (1940).

<sup>4</sup> RESTATEMENT, TORTS § 441(1) (1934); PROSSER, TORTS 266 (2d ed. 1955). Cf., 2 HARPER & JAMES, TORTS § 20.5 (1956).

<sup>5</sup> §440.

<sup>6</sup> Cf., *Thompson v. Anderman*, 59 N.M. 400, 411-12, 285 P.2d 507, 514 (1955); *State v. Columbus Hall Ass'n*, 75 N.D. 275, 285, 27 N.W.2d 664, 668 (1947); *Magnolia Petroleum Co. v. Sutton*, 208 Okla. 488, 494, 257 P.2d 307, 314 (1953); *Scott v. Simms*, 188 Va. 808, 817, 51 S.E.2d 250, 253 (1949).

and difficult when that act is a negligent one.<sup>7</sup> The question then becomes: Should the intervening negligence of *X* be regarded as a "superseding cause," relieving *D* of liability? Although the courts are divided on this question,<sup>8</sup> they often hold that a negligent intervening act is a superseding cause absolving the first negligent actor of liability.<sup>9</sup> Are the courts justified in reaching such a result?<sup>10</sup> Is there any justification for the whole concept of superseding cause?<sup>11</sup> One can best answer these and other questions by a critical examination of cases involving intervening negligence.

#### LIABILITY OF THE FIRST NEGLIGENT ACTOR AND ACTUAL CAUSATION

The logical starting point in dealing with the problem of intervening negligence is actual causation, for it is abundantly clear that the first actor should not be liable if his negligence was not an actual cause of the plaintiff's injury.<sup>12</sup> Most courts, applying the "but for" test, experience little difficulty in finding actual causation. If there would have been no harm to the plaintiff but for the negligence of *D* (the first actor), then actual causation is said to exist. The "but for" test excludes only those factors which are in no way related to the plaintiff's injury,<sup>13</sup> and it is of little benefit in determining who should be liable.<sup>14</sup> One must look beyond the "but for" test in order to restrict the ambit of liability.

<sup>7</sup> See generally, Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121 (1937).

<sup>8</sup> See note 29 *infra*.

<sup>9</sup> "[I]t can be stated as a general rule that ordinarily the intervention of a negligent act as the independent and efficient cause of an injury operates to relieve one who has been guilty of prior negligence from responsibility for the injury . . ." 38 AM. JUR., *Negligence* § 72 (1941). (Emphasis added.)

<sup>10</sup> See note 19 *infra*.

<sup>11</sup> Prosser, *supra* note 1, at 398, discussing the superseding cause concept, states: "[I]t is a question of whether the defendant shall be relieved of responsibility for the result of his fault for the reason that another cause which has contributed to that result is regarded as playing a more important, significant and responsible part. Again the issue is merely one of policy which imposes liability, and any attempt to deal with it in the language of the fact of causation can lead only to perplexity and bewilderment."

<sup>12</sup> See Carpenter, *Proximate Cause*, 15 SO. CALIF. L. REV. 427 (1941); PROSSER, *op. cit. supra* note 4, at § 44.

<sup>13</sup> See Carpenter, *supra* note 12, at 428-32.

<sup>14</sup> "As a matter of practical necessity, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in making the defendant pay. But this limitation is not in any sense one of causation; it is one of rules and policies which deny liability for what has clearly been caused." Prosser, *supra* note 1, at 375.

Other courts,<sup>15</sup> and the *Restatement*,<sup>16</sup> require that the negligent conduct of *D* be a "substantial factor" in producing harm to the plaintiff. This standard, which includes in the ambit of liability only those acts which are reasonably related to the plaintiff's harm,<sup>17</sup> achieves desirable flexibility and, it is submitted, provides a more efficient framework for limiting liability than does the "but for" test of causation.

#### LIABILITY OF THE FIRST NEGLIGENT ACTOR AND SUPERSEDING CAUSE

If the negligence of the first actor does not meet the applicable test of actual causation ("but for" or "substantial factor"), then, of course, he is not liable. The concept of superseding cause, however, assumes that *D*'s negligence was an actual cause and relieves him of liability because of the existence of another causative factor, which is termed a superseding cause.<sup>18</sup> It is at this point that artificial methods of restricting *D*'s liability are invoked. Instead of frankly admitting that causative negligence alone will not result in *D*'s being held liable, courts that apply the superseding cause concept indulge in terms such as "intervening, efficient cause," "remote cause," or "condition and cause,"<sup>19</sup> suggesting the presence or absence of actual causation, in determining whether *D* should be liable for harm suffered by the plaintiff.<sup>20</sup> Although causation in fact, once established, should have no further bearing on the question of liability, courts that talk in terms of superseding cause usually submerge both actual causation and liability into the sea of proximate cause, often with disastrous results.<sup>21</sup>

What factors induce a court to hold that an intervening negligent act is, or is not, a superseding cause? The decisions show that a

<sup>15</sup> *Ferroggiaro v. Bowline*, 153 Cal. App. 2d 759, 315 P.2d 446 (1957); *Cueno v. Connecticut Co.*, 124 Conn. 647, 2 A.2d 220 (1938); *Parks v. Starks*, 342 Mich. 443, 70 N.W.2d 805 (1955); *Champicux v. Miller*, 255 S.W.2d 794 (Mo. 1953); *Dunham v. Village of Canisteo*, 303 N.Y. 498, 104 N.E.2d 872 (1952); *Walton v. Blauert*, 256 Wis. 125, 40 N.W.2d 545 (1949); *Phelps v. Woodward Constr. Co.*, 66 Wyo. 33, 204 P.2d 179 (1949). See 2 HARPER & JAMES, *op. cit. supra* note 4, at § 20.6 n. 54 and accompanying text.

<sup>16</sup> § 433 (1948).

<sup>17</sup> *Cf.*, RESTATEMENT, TORTS § 431, comment a (1948); PROSSER *op. cit. supra* note 4, at 221-22. *But cf.*, *Carpenter*, *supra* note 12, at 439.

<sup>18</sup> See note 6 *supra*.

<sup>19</sup> See, *e.g.*, *Fiechter v. City of Corbin*, 254 Ky. 178, 71 S.W.2d 423 (1934); *Frerichs v. Eastern Neb. Pub. Power Dist.*, 154 Neb. 777, 49 N.W.2d 619 (1951); *Johnson v. Cone*, 112 Vt. 459, 28 A.2d 384 (1942).

<sup>20</sup> See note 11 *supra*.

<sup>21</sup> See, *e.g.*, *Workman v. Howard Zinc Corp.*, 97 Cal. App. 418, 425, 218 P.2d 43, 48 (1950) (defining dependent cause); *Peoples v. Fulk*, 220 N.C. 635, 18 S.E.2d 147 (1942); *Sturdevant v. Kent*, 322 P.2d 408 (Okla. 1958) (condition not the proximate cause); *Listino v. Union Paving Co.*, 386 Pa. 32, 124 A.2d 83 (1956); *Jowett v.*

holding either way may be the result of numerous considerations, only some of which are articulated in the opinions.<sup>22</sup> The result is invariably rationalized in terms of causation when, actually, the factors considered are foreign to that concept. The following sections attempt to analyze these rationalizations and their underlying reasons.

#### THE CONCEPT OF FORESEEABILITY APPLIED TO NEGLIGENT INTERVENTION

The concept of foreseeability is used in all states in determining the liability of the first negligent actor.<sup>23</sup> It is necessary, however, to distinguish between two applications of the foreseeability concept: (1) foreseeability of harm, which, as an element of negligence,<sup>24</sup> is unrelated to the actual causation issue,<sup>25</sup> and (2) foreseeability of intervening act, which also has nothing to do with actual causation, but has been invoked as a criterion for determining liability (*i.e.*, proximate cause).<sup>26</sup>

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Pennsylvania Power Co., 383 Pa. 330, 118 A.2d 452 (1955); De Luca v. Manchester Laundry & Dry Cleaning Co., 380 Pa. 484, 112 A.2d 372 (1953) (negligence of defendant created "passive background").

<sup>22</sup> "One eminent authority has said to determine the question of proximate cause, it must be based 'upon mixed questions of logic, common sense, justice, policy and precedent.'" *Jaggers v. Southeastern Greyhound Lines*, 34 F. Supp. 667, 669 (M.D. Tenn. 1940).

<sup>23</sup> Foreseeability of harm is necessary only when the harm is an indirect or remote result of negligence of the defendant. *Dixon v. Kentucky Util. Co.*, 295 Ky. 32, 174 S.W.2d 19 (1943).

<sup>24</sup> *Cf.*, 2 HARPER & JAMES, *op. cit. supra* note 4, at §§ 16.9, 20.5.

<sup>25</sup> "[F]oreseeability has no place when we are considering proximate or legal cause. Foreseeability, however, is an element . . . when the question of negligence is being considered." *Dahlstrom v. Shrum*, 368 Pa. 423, 428-29, 84 A.2d 289, 292 (1951). Many jurisdictions, however, include the question of foreseeability of harm within the framework of proximate cause. See, *e.g.*, *United States v. Kelly*, 236 F.2d 233 (8th Cir. 1956); *United States v. White*, 211 F.2d 79 (9th Cir. 1954); *Dixon v. Kentucky Util. Co.*, 295 Ky. 32, 174 S.W.2d 19 (1943); *Dickerson v. St. Louis Pub. Serv. Co.*, 365 Mo. 738, 286 S.W.2d 820 (1956); *Gaines v. Property Servicing Co.*, 276 S.W.2d 169 (Mo. App. 1955); *Moore v. St. Louis S.W. Ry.*, 301 S.W.2d 395 (Mo. App. 1957); *Banks v. Shepard*, 230 N.C. 86, 52 S.E.2d 215 (1949); *Moyers v. Ogle*, 24 Tenn. App. 622, 138 S.W.2d 637 (1940); *Southwestern Greyhound Lines v. Wafer*, 208 S.W.2d 614 (Tex. Civ. App. 1948).

<sup>26</sup> See *Milwaukee Ry. v. Kellogg*, 94 U.S. 469 (1876); *Person v. Cauldwell-Wingate Co.*, 176 F.2d 237 (2d Cir. 1949); *Edwards v. United States*, 164 F. Supp. 885 (M.D. Ga. 1958); *Manion v. Chicago R. Is. & Pac. Ry.*, 12 Ill. App. 2d 1, 138 N.E.2d 98 (1956); *Indiana Servicing Corp. v. Johnston*, 34 N.E.2d 157 (Ind. App. 1941); *Leveillee v. Wright*, 300 Mass. 382, 15 N.E.2d 247 (1938); *Riddle v. Artis*, 243 N.C. 668, 91 S.E.2d 894 (1956); *Hart v. Curry*, 238 N.C. 448, 78 S.E.2d 170 (1953); *Smith v. Grubb*, 238 N.C. 665, 78 S.E.2d 598 (1953); *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 90 N.E.2d 859 (1950); *Spicers, Inc. v. Rudd*, 199 Okla. 576, 188 P.2d 692 (1947).

Courts are often prone to confuse the two applications or to use them interchangeably as a single element of proximate cause.<sup>27</sup>

The concept of foreseeability of intervening act is applied in most states.<sup>28</sup> It is said that a reasonably foreseeable intervening act is not a superseding cause. While the test of foreseeability is more stringent in some jurisdictions,<sup>29</sup> most courts hold that it is not necessary that the actual intervening act should have been foreseeable. Rather, this requirement is satisfied if the first negligent actor, exercising reasonable care, should have foreseen that an intervening act would occur.<sup>30</sup>

<sup>27</sup> See *Nichols v. City of Phoenix*, 68 Ariz. 124, 202 P.2d 201 (1949); *Ferroggiaro v. Bowline*, 415 P.2d 446 (Cal. Dist. Ct. App. 1957); *Szymanaska v. Equitable Life Ins. Co.*, 37 Del. 272, 183 Atl. 309 (1936); *Parsons v. Grant*, 95 Ga. App. 431, 98 S.E.2d 219 (1957); *Neering v. Ill. Cent. R.R.*, 383 Ill. 366, 50 N.E.2d 497 (1943); *Haskell v. Perkins*, 16 Ill. App. 2d 428, 148 N.E.2d 625 (1958); *Dodds v. Chicago Trans. Authority*, 9 Ill. App. 2d 388, 132 N.E.2d 816 (1956); *Knaus Truck Lines, Inc. v. Commercial Freight Lines*, 238 Iowa 1356, 29 N.W.2d 204 (1947); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954); *Lane v. Atlantic Works*, 111 Mass. 136 (1872); *E. I. du Pont de Nemours & Co. v. Ladner*, 221 Miss. 378, 73 So. 2d 249 (1954); *Curtis v. Jacobson*, 142 Me. 351, 54 A.2d 520 (1947); *Champieux v. Miller*, 255 S.W.2d 794 (Mo. 1953); *Egenberger v. National Alfalfa Dehydrating & Milling Co.*, 164 Neb. 704, 83 N.W.2d 523 (1957); *Menth v. Breeze Corp.*, 4 W.Va. 428, 73 A.2d 183 (1950); *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955); *Foley v. State*, 265 App. Div. 682, 41 N.Y.S.2d 256 (1943); *Faircloth v. Atlantic C.L.R.R.*, 247 N.C. 190, 100 S.E.2d 328 (1957); *Hayes v. City of Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956); *German v. Muskingom Valley Trans. Co.*, 94 N.E.2d 52 (Ohio C.P. 1950); *Yellow Trans. Freight Lines v. Allred*, 302 P.2d 985 (Okla. 1956); *Stark v. Lehigh Foundries*, 388 Pa. 1, 130 A.2d 123 (1957); *Floyd v. Turgeon*, 68 R.I. 218, 27 A.2d 330 (1942); *Bradley v. Fowler*, 210 S.C. 231, 42 S.E.2d 234 (1947); *Friendship Tel. Co. v. Russom*, 309 S.W.2d 416 (Tenn. Ct. App. 1957); *Rader v. Nashville Gas Co.*, 268 S.W.2d 114 (Tenn. Ct. App. 1953); *Kimbriel Produce Co. v. Mayo*, 180 S.W.2d 504 (Tex. Civ. App. 1944); *Johnson v. Cone*, 112 Vt. 459, 28 A.2d 384 (1942); *Selfe v. Hale*, 193 Va. 543, 69 S.E.2d 434 (1952).

<sup>28</sup> See, e.g., *Hickert v. Wright*, 182 Kan. 100, 319 P.2d 152 (1957); *Johnson v. Cone*, *supra* note 27.

<sup>29</sup> See 2 HARPER & JAMES, *op. cit. supra* note 4, § 20.5 at 1149; PROSSER, *op. cit. supra* note 4, at 268. Some courts, and the *Restatement*, invoke a more liberal test, from the plaintiff's point of view. See, e.g., *Hayes v. City of Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956); *Adam v. Los Angeles Trans. Lines*, 317 P.2d 642 (Cal. Dist. Ct. App. 1957); *Knaus Truck Lines v. Commercial Freight Lines*, 238 Iowa 1356, 29 N.W.2d 204 (1947); *Champieux v. Miller*, 255 S.W.2d 794 (Mo. 1953); *RESTATEMENT, TORTS* § 447. "[T]he decided modern trend of authority, both in England and America, has been to make the liability of the defendant turn upon whether the intervening human action was foreseeable and to hold the defendant liable where in the retrospect the intervening act did not appear to be particularly unusual or extraordinary." Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 125 (1937).

<sup>30</sup> See *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir. 1933); *Lebeck v. Wm. A. Jarvis, Inc.*, 145 F. Supp. 706 (E.D. Pa. 1956); *Cuneo v. Con-*

In those states which apply the substantial factor test in determining actual causation, foreseeability of intervening act is not usually required.<sup>31</sup> One might expect that those states applying the "but for" test of actual causation would require foreseeability of intervening act to hold *D* liable. However, many of these states do not require this foreseeability under some circumstances, as where the negligence of *D* is clearly a significant factor in producing harm.<sup>32</sup> The decisions exhibit a definite trend away from requiring foreseeability of intervening act under all circumstances. In fact, there is a substantial trend, particularly in the Pacific and southwestern states, away from requiring foreseeability of intervening act in any case.<sup>33</sup> A result of this movement is shown in recent cases which evidence greater liberality in holding the first negligent actor liable.

In summary, the foreseeability picture at present is as follows:

1. Foreseeability of harm and foreseeability of intervening act are often confused.
2. Foreseeability of intervening act is usually required in cases in which the negligence of *D* and the resulting harm are not closely related.

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necicut Co., 124 Conn. 647, 2 A.2d 220 (1938); *Parks v. Starks*, 342 Mich. 443, 70 N.W.2d 805 (1955); *Coyne v. Pittsburgh Rys.* 393 Pa. 326, 141 A.2d 830 (1958). *But see*, *Champieux v. Miller*, 255 S.W.2d 794 (Mo. 1953).

<sup>31</sup> *Wilson v. Goscinske*, 233 F.2d 759 (6th Cir. 1956) (normal reaction); *Eberhart v. Abshire*, 158 F.2d 24 (7th Cir. 1946) (set in motion by); *Gibson v. Garcia*, 96 Cal. App. 2d, 681, 216 P.2d 119 (1950) (substantial factor); *Parker v. City and County of San Francisco*, 158 Cal. App. 2d 597, 323 P.2d 108 (1958) (acts concur in producing harm); *Hoffman v. Barker*, 79 Idaho 339, 317 P.2d 335 (1957) (concurrent negligence); *Cassity v. Brady*, 182 Kan. 381, 321 P.2d 171 (1958) (primary negligence); *Louisville & N. Ry. v. Stephens*, 298 Ky. 328, 182 S.W.2d 447 (1944) (set in motion by); *Holmberg v. Villaume*, 158 Minn. 442, 197 N.W. 849 (1924) (directly contributes); *Thelen v. Spilman*, 251 Minn. 89, 86 N.W.2d 700 (1957) (so near in time); *Continental So. Lines v. Klass*, 217 Miss. 2d 795, 65 So. 2d 575 (1953) (set into operation by); *Gaines v. Property Servicing Co.*, 276 S.W.2d 169 (Mo. App. 1955) (combines with intervening cause).

<sup>32</sup> *United States v. Kelly*, 236 F.2d 233 (8th Cir. 1956); *Lebeck v. Wm. A. Jarvis, Inc.*, 145 F. Supp. 706 (E.D. Pa. 1956); *Dixon v. Kentucky Util. Co.*, 295 Ky. 32, 174 S.W.2d 19 (1943); *Banks v. Shepard*, 230 N.C. 86, 52 S.E.2d 215 (1949); *Moyers v. Ogle*, 24 Tenn. 682, 148 S.W.2d 637 (1940); *Southwestern Greyhound Lines v. Wafer*, 208 S.W.2d 614 (Tex. Civ. App. 1948).

<sup>33</sup> *Cf.*, *Parker v. City & County of San Francisco*, 158 Cal. App. 2d 597, 323 P.2d 108 (1958); *Urland v. French*, 141 Cal. App. 2d 278, 296 P.2d 568 (1956); *Russell v. City of Idaho Falls*, 78 Idaho 466, 305 P.2d 740 (1956); *Moore v. St. Louis S.W. Ry.*, 301 S.W.2d 395 (Mo. App. Ct. 1957); *Dulley v. Berkley*, 304 S.W.2d 878 (Mo. 1957); *Magnolia Petroleum Co. v. Sutton*, 208 Okla. 488, 257 P.2d 307 (1953); *Levitan v. Banniza*, 34 Tenn. App. 176, 236 S.W.2d 90 (1951); *Southwestern Grey-*

3. Foreseeability of intervening act is not usually required in cases in which the negligence of *D* is a substantial factor in producing harm.
4. The modern trend is away from requiring foreseeability of intervening act in all cases.

OTHER RATIONALIZATIONS USED TO RELIEVE THE FIRST  
NEGLIGENT ACTOR OF LIABILITY

In addition to foreseeability, courts use a number of other "rules"<sup>34</sup> of proximate cause in order to determine whether the first negligent actor should be liable. These "rules," of course, have nothing to do with causation, but are used to justify the decisions. The factors actually considered by the courts are subsumed under the "cloak of proximate cause," resulting in confusion and perplexity.<sup>35</sup>

In cases in which the negligence of *D* is not "closely connected" to the resulting harm because of lapse of time or presence of substantial intervening acts, courts which hold that the first actor's negligence was not a proximate cause emphasize the "remoteness"<sup>36</sup> of the causal relation between the actor's conduct and the resulting harm. Labels,<sup>37</sup> such as "sole cause" and "*the* proximate cause," are indulged. The rule followed by most courts, that an intervening act is not a superseding cause if it was reasonably foreseeable, is ignored,<sup>38</sup> or a strict and unreasonable foreseeability requirement is invoked which makes it virtually impossible to hold that the intervening act was reasonably fore-

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hound Lines v. Wafer, 208 S.W.2d 614 (Tex. Civ. App. 1948); Phelps v. Woodward Constr. Co., 66 Wyo. 33, 204 P.2d 179 (1949).

<sup>34</sup> The word "rules" is enclosed in quotation marks in order to distinguish rationalizations discussed here from rules that have been suggested by legal scholars. See e.g., RESTATEMENT, TORTS, §§ 443, 447-49; Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 471 (1932).

<sup>35</sup> Prosser, *supra* note 1, at 398.

<sup>36</sup> Fiechter v. City of Corbin, 254 Ky. 178, 71 S.W.2d 423 (1934); Huffman v. Sorenson, 194 Va. 932, 76 S.E.2d 183 (1953).

<sup>37</sup> Frerichs v. Eastern Neb. Pub. Power Dist., 154 Neb. 777, 49 N.W.2d 619 (1951); Faircloth v. Atlantic C.L.R.R., 247 N.C. 190, 100 S.E.2d 328 (1957); Troxler v. Central Motor Lines, 240 N.C. 420, 82 S.E.2d 342 (1954); Sturdevant v. Kent, 322 P.2d 408 (Okla. 1958).

<sup>38</sup> Lang v. New York Cent. R.R., 255 U.S. 455 (1921); Smith v. United States, 155 F. Supp. 605 (E.D. Va. 1957); Hooks v. Hudson, 237 N.C. 695, 75 S.E.2d 758 (1953); Garner v. Pittman, 237 N.C. 328, 75 S.E.2d 111 (1953); Goodwin v. Nixon, 236 N.C. 632, 74 S.E.2d 24 (1953); Clark v. Lambreth, 235 N.C. 578, 70 S.E.2d 828 (1952); Murray v. Atlantic C.L.R.R., 218 N.C. 392, 11 S.E.2d 326 (1940); Listino v. Union Paving Co., 386 Pa. 32, 124 A.2d 83 (1956); Huffman v. Sounson, 194 Va. 932, 76 S.E.2d 183 (1953); Chesapeake & O. Ry. v. Hartwell, 142 W. Va. 318, 95 S.E.2d 462 (1956).

seeable.<sup>39</sup> In cases of this type the court is in effect invoking a crude substantial factor test which fails to limit itself to the question of causation.<sup>40</sup> There are also other factors, such as the nature of the intervening act,<sup>41</sup> the scope of the first actor's duty,<sup>42</sup> and the type of harm suffered by the plaintiff as compared to the nature of the actor's negligence.<sup>43</sup> Although these factors are seldom suggested and rarely spelled out, they are incorporated into the nebulous concept of proximate cause. Opinions which deal with liability in this manner are often incoherent<sup>44</sup> and sometimes incomprehensible.<sup>45</sup>

In a second type of fact situation, the negligence of the first actor is more readily identified as a cause of the plaintiff's injury. Yet an even more untenable holding results from judicial efforts to relieve the first negligent actor of liability. Meaningless phrases, such as "efficient cause,"<sup>46</sup> "superseding cause,"<sup>47</sup> "moving cause,"<sup>48</sup> "independent and dependent cause,"<sup>49</sup> "condition and cause,"<sup>50</sup> and "passive,"<sup>51</sup> or "static"<sup>52</sup> negligence, frequently appear in these opinions. The negli-

<sup>39</sup> See *Indiana Serv. Corp. v. Johnston*, 109 Ind. App. 204, 34 N.E.2d 157 (1941); *Dixon v. Kentucky Util. Co.*, 295 Ky. 32, 174 S.W.2d 19 (1943); *Robinson v. Butler*, 226 Minn. 491, 33 N.W.2d 821 (1942); *Rader v. Nashville Gas Co.*, 37 Tenn. App. 621, 268 S.W.2d 114 (1954); *Meyette v. Canadian Pac. Ry.*, 110 Vt. 345, 6 A.2d 33 (1939). See also, MORRIS, TORTS 191 (1953).

<sup>40</sup> *Accord*, PROSSER, *op. cit. supra* note 4, at 256.

<sup>41</sup> See note 55 *infra*.

<sup>42</sup> *Cf.*, PROSSER, *Selected Topics on the Law of Torts*, 221-34 (1954).

<sup>43</sup> *Cf.*, MORRIS, *op. cit. supra* note 39, at § 4; GREEN, JUDGE AND JURY 38-152 (1930). PROSSER, *op. cit. supra* note 42, at 209-15.

<sup>44</sup> See *Waterloo Savings Bank v. Waterloo Cedar Falls & N.R.R.*, 244 Iowa 1364, 60 N.W.2d 572 (1953); *Karpf v. Adams*, 237 N.C. 106, 74 S.E.2d 325 (1953); *Listino v. Union Paving Co.*, 386 Pa. 32, 124 A.2d 83 (1956).

<sup>45</sup> See *Lang v. New York Cent. R.R.*, 255 U.S. 455 (1921); *Haney v. Town of Lincolnton*, 207 N.C. 282, 176 S.E. 573 (1934); *Chesapeake & O. Ry. v. Hartwell*, 142 W. Va. 318, S.E.2d 462 (1956).

<sup>46</sup> *Lund v. Minnesota St. P. Ry.*, 250 Minn. 550, 86 N.W.2d 78 (1957); *Duke v. Missouri, Pac. R.R.*, 303 S.W.2d 613 (Mo. 1957).

<sup>47</sup> *Cf.*, *Listino v. Union Paving Co.*, 386 Pa. 32, 124 A.2d 83 (1956) and cases cited therein; *Scott v. Simms*, 188 Va. 808, 51 S.E.2d 250 (1949).

<sup>48</sup> *Ecker v. Union Pac. R.R.*, 164 Neb. 744, 83 N.W.2d 551 (1957).

<sup>49</sup> *Smith v. United States*, 155 F. Supp. 605 (E.D. Va. 1957); *Workman v. Howard Zinc Corp.*, 97 Cal. App. 2d 418, 218, P.2d 43 (1950); *Carpenter*, *supra* note 34, at 484.

<sup>50</sup> *Drohan v. Standard Oil Co.*, 168 F.2d 761 (7th Cir. 1948); *Jaggers v. Southeastern Greyhound Lines*, 34 F. Supp. 667 (M.D. Tenn. 1940); *Frerichs v. Eastern Neb. Pub. Power Dist.*, 154 Neb. 777, 49 N.W.2d 619 (1951); *Sturdevant v. Kent*, 322 P.2d 408 (Okla. 1958); *Nashville C. & St. L. Ry. v. Harrell*, 21 Tenn. App. 353, 110 S.W.2d 1032 (1937); *Chaney v. Van Luit*, 306 S.W.2d 377 (Tex. Civ. App. 1957).

<sup>51</sup> *Lancaster v. Atlantic Greyhound Corp.*, 219 N.C. 679, 14 S.E.2d 820 (1941).

<sup>52</sup> *Nichols v. City of Phoenix*, 68 Ariz. 124, 202 P.2d 201 (1949); *Georgia N. Ry.*

gence of *D* is often labelled "passive," creating only a "condition," which, when acted upon by intervening negligence, causes the plaintiff's harm.<sup>53</sup> Two well-known propositions, the doctrine of "insulated negligence"<sup>54</sup> and the "last wrongdoer" rule,<sup>55</sup> are well-known examples of the use of these meaningless phrases in restricting liability.

In a third group of cases, the question whether the first actor's conduct was a proximate cause turns on the culpability of the intervening act.<sup>56</sup> The test enunciated in the well-known case of *Kline v. Moyer*<sup>57</sup> involves such a limitation on the liability of *D* and has been applied in at least ten jurisdictions.<sup>58</sup> Under this rule of thumb, if a second negligent actor becomes aware of the existence of a potential danger created by the negligence of *D*, and he thereafter, by an independent act of negligence, brings about the harm to the plaintiff, then *D* is relieved of liability.<sup>59</sup> While this rule sounds deceptively competent, in

v. Hathcock, 93 Ga. App. 72, 91 S.E.2d 145 (1955).

<sup>53</sup> See 65 C.J.S. *Negligence* § 110 n. 91 (1950). *But see*, Northern Ind. Trans. Co. v. Burk, 288 Ind. 162, 89 N.E.2d 905 (1950).

<sup>54</sup> This method of restricting liability is employed extensively in North Carolina. See generally, Atlantic Greyhound Corp. v. Hunt, 163 F.2d 117 (4th Cir. 1947); Alford v. Washington, 238 N.C. 694, 78 S.E.2d 915 (1953); Lancaster v. Atlantic Greyhound Corp., 219 N.C. 679, 14 S.E.2d 820 (1941); Murray v. Atlantic C.L.R.R., 218 N.C. 392, 405, 11 S.E.2d 326, 335 (1940) (dissenting opinion).

<sup>55</sup> Chesapeake & O. Ry. v. Hartwell, 142 W. Va. 318, 95 S.E.2d 462 (1956), is the only recent case found which invokes the rule. "The rule that the last wrongdoer only will be held responsible . . . finds little support." Note, 9 MINN. L. REV. 273, 274 (1925). See generally, Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 124-26 (1937); 76 U. PA. L. REV. 720 (1928).

<sup>56</sup> Many courts have emphasized culpability by distinguishing between an intervening act which is *malum in se* and one which is *malum prohibitum*, relieving the first negligent actor in the former situation. See Pittman v. Staples, 95 Ga. App. 187, 97 S.E.2d 630 (1957). The modern trend favors holding *D* liable, even though the intervening act is *malum in se*, if the intervening criminal act was reasonably foreseeable. See Liberty Nat'l Life Ins. Co. v. Weldon, 267 Ala. 171, 100 So. 2d 696 (1957); Ney v. Yellow Cab Co. 2 Ill. App. 74, 117 N.E.2d 74 (1954).

<sup>57</sup> 325 Pa. 357, 191 Atl. 43 (1937).

<sup>58</sup> Georgia N.E. Ry. v. Hathcock, 93 Ga. App. 72, 91 S.E.2d 145 (1955); Sims v. Hallett Constr. Co., 247 Minn. 339, 77 N.W.2d 54 (1956); E. I. du Pont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954); Duke v. Missouri Pac. R.R., 303 S.W.2d 613 (Mo. 1957); Meyer v. Board of Educ., 9 N.J. 46, 86 A.2d 761 (1952); Rankin v. S.S. Kresge Co., 59 F. Supp. 613 (N.D. Va. 1945); Calder v. Gresham, 224 N.C. 402, 30 S.E.2d 312 (1944); Jeloszewski v. Sloan, 375 Pa. 360, 100 A.2d 480 (1953); Chadwick v. Popadick, 390 Pa. 511, 136 A.2d 87 (1957) (applying the converse of the rule to hold the first negligent actor liable); Levitan v. Banniza, 34 Tenn. App. 176, 236 S.W.2d 90 (1951); Hillyard v. Utah Ry. Prods. Co., 1 Utah 2d 143, 263 P.2d 287 (1953); Edgerton v. Norfolk So. Bus Corp., 187 Va. 642, 47 S.E.2d 409 (1948).

<sup>59</sup> *Contra*, 65 C.J.S. *Negligence* § 111 n. 47 (1950).

application it is little more than a re-enactment of the often-denounced rule that the person whose wrongful act most nearly precedes the injury shall alone be liable.<sup>60</sup>

These rules, based on the nature of the intervening act, are obviously far removed from principles of causation. In deciding that the negligence of *D* was not a proximate cause of the resulting harm, the court ignores the part played by *D* in causing the harm, looking only to the nature of the intervening act. This test of proximate cause is at best negative.<sup>61</sup> It is submitted that more logical methods of determining liability are available.<sup>62</sup>

#### REASONS GIVEN FOR HOLDING THE FIRST NEGLIGENT ACTOR LIABLE

In direct contrast to the cases in which courts have had to resort to fictions to relieve *D* of liability are the majority of cases which allow recovery, even though still talking in terms of proximate cause. These cases can also be conveniently discussed according to the factual situation presented.

A large number of cases involve situations in which the negligence of *D* is not "closely connected" to the resulting harm. As seen above, courts bent on restricting the scope of liability in factual situations of this type will term the negligence of *D* a "remote cause" and absolve him of liability. In the majority of cases, however, in which *D* is held liable, his negligent act was, in fact, a primary causative factor<sup>63</sup> from which later events followed, so that the intervening act and the resulting harm can be termed "natural and probable."<sup>64</sup> It is said that the negligence of *D* "sets in motion"<sup>65</sup> the intervening act, or that it "increases

<sup>60</sup> See note 54 *supra*. The *Kline v. Moyer* rule differs from the last wrongdoer rule in that it requires that the second negligent actor be aware of the danger. Because of this, others believe that the rule is a variant of the doctrine of last clear chance.

<sup>61</sup> *Cf.*, 2 HARPER & JAMES, *op. cit. supra* note 4, at 1144; 9 MINN. L. REV. 273, 277 (1925).

<sup>62</sup> See note 111 *infra*.

<sup>63</sup> *Cf.*, *Clinger v. Duncan*, 166 Ohio St. 216, 141 N.E.2d 156 (1957).

<sup>64</sup> *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955); *Yellow Transit Freight Lines, Inc. v. Allred*, 302 P.2d 985 (Okla. 1956). Several states use the term natural and probable, or a variation thereof, in instructions to juries. See generally, 3 BRANSON, INSTRUCTIONS TO JURIES § 1230 (1936 Supp., 1958). No judicial attempt to define these terms has been found.

<sup>65</sup> *Eberhart v. Abshire*, 158 F.2d 24 (7th Cir. 1946) (Ind.); *Loftin v. McCrainie*, 47 So. 2d 298 (Fla. 1950); *Parsons v. Grant*, 95 Ga. App. 431, 98 S.E.2d 219 (1957); *Louisville & N.R. Co. v. Stephens*, 298 Ky. 328, 182 S.W.2d 447 (1944); *Pfaehler v. Ten Cent Taxi Co.*, 198 S.C. 476, 18 S.E.2d 331 (1942); *Continental So. Lines Inc. v. Klaas*, 217 Miss. 795, 65 So. 2d 575 (1953); 38 AM. JUR. *Negligence* § 69 (1941).

the likelihood"<sup>66</sup> of such an act, or that it "induces"<sup>67</sup> the subsequent cause. The "normal reaction"<sup>68</sup> intervening act usually falls within this category, as does the factual situation in which the type of harm that resulted was reasonably foreseeable.<sup>69</sup> Because most jurisdictions apply the "but for" test of actual causation, a further determination that *D*'s act was such a primary cause will invariably impose liability. It should be noted, however, that most courts refuse to discuss the question in terms of liability, talking instead in terms of proximate cause.<sup>70</sup>

The *Restatement*, though requiring that *D*'s negligence be a substantial factor in producing harm,<sup>71</sup> supports this proximate cause<sup>72</sup> approach to the question of liability. In allowing the plaintiff to recover from *D* if the intervening negligent act was a "normal response"<sup>73</sup> to the situation created by the negligence of *D*, the *Restatement* adds that "normal is used as the opposite of highly extraordinary and not in its more customary sense of standard or usual."<sup>74</sup> Another section invokes an extremely liberal foreseeability of intervening act requirement, imposing liability upon *D* if his negligence was a substantial factor in producing harm and:<sup>75</sup>

<sup>66</sup> *Kisor v. Tulsa Rendering Co.*, 113 F. Supp. 10 (W.D. Ark. 1953); *Spicers, Inc. v. Rudd*, 199 Okla. 576, 188 P.2d 692 (1948).

<sup>67</sup> *McClelland v. Interstate Trans. Lines*, 142 Neb. 439, 6 N.W.2d 384 (1942); *Egenberger v. National Alfalfa Dehydrating and Milling Co.*, 164 Neb. 704, 83 N.W.2d 523 (1957).

<sup>68</sup> *Wilson v. Goscinske*, 233 F.2d 759 (6th Cir. 1956); *Hill v. Wilson*, 216 Ark. 179, 224 S.W.2d 797 (1949); *Friendship Tel. Co. v. Russom*, 309 S.W.2d 416 (Tenn. Ct. App. 1957).

<sup>69</sup> *Foley v. State*, 265 App. Div. 682, 41 N.Y.S.2d 256 (1943). "[I]f the defendant's conduct exposes persons in the class to which plaintiff belongs to a foreseeable risk of injury, and his act or omission contributes substantially to injury of that nature actually occurring, he may be held liable notwithstanding the fact that an unforeseeable independent intervening act is a concurring cause." (Emphasis added.) *Gibson v. Garcia*, 96 Cal. App. 2d 681, 684, 216 P.2d 119, 121 (1950). *Accord*, *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir. 1933).

<sup>70</sup> See, e.g., *Slattery v. Marra Bros.*, 186 F.2d 134 (2d cir. 1951); *Ferroggiaro v. Bowline*, 153 Cal. App. 2d 159, 315 P.2d 446 (1957); *McEvoy v. American Pool Corp.*, 32 Cal. 2d 195, 195 P.2d 783 (1948); *Hoffmann v. Barker*, 79 Idaho 339, 317 P.2d 335 (1957); *Trapp v. Standard Oil Co.*, 176 Kan. 39, 269 P.2d 469 (1954); *Moyers v. Ogle*, 148 S.W.2d 637 (Tenn. Ct. App. 1940).

<sup>71</sup> RESTATEMENT, TORTS § 431(a).

<sup>72</sup> RESTATEMENT, § 431, employs the term "legal cause." *Phelps v. Woodward Constr. Co.*, 66 Wyo. 33, 204 P.2d 179 (1949), follows the *Restatement* position and contains a good discussion of the problem.

<sup>73</sup> RESTATEMENT, TORTS §§ 443, 447(c).

<sup>74</sup> RESTATEMENT, TORTS § 443 comment b.

<sup>75</sup> RESTATEMENT, TORTS § 447(a) (b).

- (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 a third person had so acted.

A third section of the *Restatement* which has been received favorably by the courts invokes liability "if the reasonable likelihood that a third person may act in a [negligent] manner is the hazard or one of the hazards which makes the actor's [*D*'s] conduct negligent. . . ."<sup>76</sup>

The *Restatement*, then, repeats the proximate cause approach employed by the courts, but it more openly concludes that liability results when an act is labeled a "proximate cause" of the plaintiff's harm. The *Restatement*, in effect, uses the terms synonymously.<sup>77</sup>

If a court dealing with a "remote" cause situation finds that the negligent act of *D* was a proximate cause of the plaintiff's harm, or even if it immediately concludes that *D* is liable, the harm suffered by the plaintiff is, in effect, held to be a risk that should be borne by *D*. Legal scholars are in agreement on this point.<sup>78</sup> Professor Green states the problem thus:<sup>79</sup>

[I]t should be clear that it is in connection with the problem of defining the scope of protection given to any interest that the courts are prone to seek

<sup>76</sup> RESTATEMENT, TORTS § 449.

<sup>77</sup> The *Restatement* provisions represent great progress in this area of negligence. Sections 447 and 339 especially have been followed by a substantial number of courts. The following cases are in accord with § 447 of the *Restatement*. *Bowser v. Publicker Indust.*, 101 F. Supp. 286 (E.D. Pa.), *aff'd*, 192 F.2d 933 (3rd Cir. 1951); *Hill v. Wilson*, 216 Ark. 179, 224 S.W.2d 797 (1949); *Warner v. Santa Catalina Is. Co.*, 44 Cal. 2d 310, 282 P.2d 12 (1955); *Parks v. Starks*, 342 Mich. 443, 70 N.W.2d 805 (1955); *Graham v. Atlantic C.L.R.R.*, 240 N.C. 338, 82 S.E.2d 346 (1954); *Rattley v. Powell*, 223 N.C. 134, 25 S.E.2d 448 (1943); *Stark v. Lehigh Foundries*, 388 Pa. 1, 130 A.2d 123 (1957); *Gies v. Consol. Freightways*, 40 Wash. 2d 488, 244 P.2d 248 (1952); *Dombrowski v. Albrent Freight & Storage Corp.*, 264 Wis. 440, 59 N.W.2d 465 (1953); *Slattery v. Marra Bros.*, 186 F.2d 134 (2d Cir. 1951); *Nichols v. City of Phoenix*, 68 Ariz. 124, 202 P.2d 201 (1949); *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955); *Abbott v. New York Pub. Library*, 263 App. Div. 314, 32 N.Y.S.2d 963 (1942); *Herring v. Springbrook Packing Co. Co-op.*, 208 Ore. 191, 299 P.2d 604 (1956); *Kimbril Produce Co. v. Mayo*, 180 S.W.2d 504 (Tex. Civ. App. 1944). *Accord*, *McClelland v. Interstate Trans. Lines*, 142 Neb. 439, 6 N.W.2d 384 (1942); See also, 65 C.J.S. *Negligence* § 111 n.43 (1950).

<sup>78</sup> See PROSSER, *op. cit. supra* note 4, at 276; 2 HARPER & JAMES, *op. cit. supra* note 4, at 1143. *Cf.*, Prosser, *Palsgraf Revisited*, in SELECTED TOPICS ON THE LAW OF TORTS 216 (1954).

<sup>79</sup> GREEN, RATIONALE OF PROXIMATE CAUSE 39 (1927).

relief in that vague conception of legal cause or proximate cause as opposed to causal relation as we speak of it generally.

A second group of cases which holds the first negligent actor liable involves fact situations in which his negligence is more closely related to the plaintiff's harm.<sup>80</sup> These cases may be compared with those in which the first actor was absolved of liability because his negligence was "passive" and therefore not a "proximate" cause. The present cases, however, in allowing the first negligent actor to be held liable, deal with the issue squarely—in terms of actual causation. It is said that the negligence of *D* was a substantial factor in producing harm,<sup>81</sup> or that his negligence continued to operate and combined<sup>82</sup> with the intervening act to cause harm, or that his negligence contributed<sup>83</sup> to the plaintiff's injury. The fact that under the "but for" test the second negligent act is also a cause is properly regarded as immaterial, so long as it can be said that no harm would have resulted but for the negligence of *D*.<sup>84</sup>

An analysis of cases of this type, in which the first actor is held liable because his negligence was an actual cause of the resulting harm, leads to the conclusion that these cases fall within the conception of legal (proximate) cause offered by the *Restatement*. The *Restatement* declares that the negligence of the first actor is a legal cause if:<sup>85</sup>

(a) his conduct is a substantial factor in bringing about the harm, and

<sup>80</sup> See, e.g., *Waterloo Savings Bank v. Waterloo C.F. & No. R.R.*, 244 Iowa 2d 1364, 60 N.W.2d 572 (1953); *Coyne v. Pittsburgh Rys.* 393 Pa. 426, 141 A.2d 830 (1958).

<sup>81</sup> *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir. 1933); *Cunco v. Connecticut Co.*, 124 Conn. 647, 2 A.2d 220 (1938); *Parks v. Starks*, 342 Mich. 443, 70 N.W.2d 805 (1955); *Phelps v. Woodward Constr. Co.*, 66 Wyo. 33, 204 P.2d 179 (1949).

<sup>82</sup> *Russell v. City of Idaho Falls*, 78 Idaho 466, 305 P.2d 740 (1956); *Leveille v. Wright*, 300 Mass. 382, 15 N.E.2d 247 (1938); *Brewer v. Town of Lucedale*, 189 Miss. 374, 198 So. 42 (1940); *Dulley v. Berkley*, 304 S.W.2d 878 (Mo. 1957); *Menth v. Breeze Corp.*, 4 N.J. 428, 73 A.2d 183 (1950).

<sup>83</sup> *Panagoulis v. Phillip Morris & Co.*, 95 N.H. 524, 68 A.2d 672 (1949); *Southwestern Greyhound Lines v. Wafer*, 208 S.W.2d 614 (Tex. Civ. App. 1948). *Accord*, *United States v. Kelly*, 236 F.2d 233 (8th Cir. 1956). These cases closely resemble those dealt with in the following section. It is little more than a question of semantics in many instances whether a court declares the negligence of *D* a contributing cause or a concurrent cause.

<sup>84</sup> See *Russell v. City of Idaho Falls*, 78 Idaho 466, 305 P.2d 740 (1956); *Swank v. Jordan*, 71 So. 2d 737 (La. Ct. App. 1954); *Gulf Refining Co. v. Brown*, 196 Miss. 131, 16 So. 2d 765 (1944). *But see*, *Smith v. Grubb*, 238 N.C. 665, 78 S.E.2d 598 (1953).

<sup>85</sup> RESTATEMENT, TORTS § 431.

(b) there is no rule of law relieving the actor of liability because of the manner in which his negligence has resulted in the harm. (Emphasis added.)

Stated more bluntly, if sufficient actual causation is present and there is no adequate reason ("rule of law") for absolving the first negligent actor of responsibility, then his negligence will be deemed a legal (proximate) cause of the resulting harm, and he will be held liable.

A growing number of the jurisdictions which approach the causation issue positively do so in terms of concurrent negligence<sup>86</sup> and concurrent causation,<sup>87</sup> completely circumventing the dangerous waters of superseding cause.<sup>88</sup> The first actor is liable if his negligence concurs<sup>89</sup> with the negligence of another in producing the harm. It is usually required that the negligence of *D* be in "active operation" at the time of the harm.<sup>90</sup> Exactly what constitutes active operation is not settled, however.<sup>91</sup> For example, in a single jurisdiction, a negligently parked automobile was in one case held to constitute "operative negligence,"<sup>92</sup> yet other similar cases have termed such negligence "passive."<sup>93</sup>

The concurrent causation theory of liability, by ignoring the unsatisfactory terminology of proximate cause, avoids the difficulties encountered in the use of terms such as "efficient cause," "superseding cause," and "static" or "remote" negligence. The *Restatement* contains a conservative adaptation of this theory.<sup>94</sup>

<sup>86</sup> *Wilson v. Edwards*, 138 W. Va. 613, 77 S.E.2d 164 (1953).

<sup>87</sup> *Kelly v. Locke*, 58 Ga. 558, 199 S.E. 544 (Ct. App. 1938).

<sup>88</sup> *Cf.*, Note 49 MICH. L. REV. 288 (1951).

<sup>89</sup> *Watt v. Comps*, 244 Ala. 31, 12 So. 2d 189 (1943); *Langston v. Moseley*, 223 Ark. 250, 265 S.W.2d 697 (1954); *Slippery v. San Diego Yellow Cabs*, 89 Cal. App. 2d 645, 201 P.2d 543 (1949); *Marion v. Chicago, R. Is. & Pac. Ry.*, 12 Ill. App. 2d 1, 138 N.E.2d 98 (1956); *Lindquist v. Des Moines U. Ry.*, 239 Iowa 356, 30 N.W.2d 120 (1948); *Edgerton v. H.P. Welch Co.*, 321 Mass. 603, 74 N.E.2d 674 (1947); *Tillman v. Bellamy*, 242 N.C. 201, 87 S.E.2d 253 (1955); *Dickerson v. St. Louis Pub. Serv. Co.*, 286 S.W.2d 820 (Mo. 1956); *Yandell v. National Fireproofing Corp.*, 239 N.C. 1, 79 S.E.2d 223 (1953); *Benton v. Pellum*, 232 S.C. 26, 100 S.E.2d 534 (1957).

<sup>90</sup> *Cassity v. Brady*, 182 Kan. 381, 321 P.2d 171 (1958); *Parks v. Starks*, 342 Mich. 443, 70 N.W.2d 805 (1955). *But cf.*, *Dixon v. Kentucky Util. Co.*, 295 Ky. 32, 174 S.W.2d 19 (1943); *Garbe v. Halloran*, 150 Ohio St. 476, 83 N.E.2d 217 (1948).

<sup>91</sup> For example, the Supreme Court of South Carolina has confused the question by declaring that reasonable foreseeability of intervening act "causes" the negligence of *D* to remain active. Such a deduction is, of course, absurd. See *Bradley v. Fowler*, 210 S.C. 231, 42 S.E.2d 234 (1947); *Ayers v. Atlantic Greyhound Corp.*, 208 S.C. 267, 37 S.E.2d 737.

<sup>92</sup> *Riddle v. Artis*, 243 N.C. 668, 91 S.E.2d 894 (1956).

<sup>93</sup> *Smith v. Grubb*, 238 N.C. 665, 78 S.E.2d 598 (1953); *Clark v. Lambreth*, 235 N.C. 578, 70 S.E.2d 828 (1952).

<sup>94</sup> RESTATEMENT, TORTS § 439. This section was followed in Northern Ind. Trans.

If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.

It is not at all clear what is meant by the self-contradictory term "substantially simultaneous." The comment on the section is of little help, providing only one example.<sup>95</sup>

The cases that are decided on the theory of concurrent negligence deal more closely with the problem of liability in terms of actual causation than any other group. It is submitted, however, that even in this type of case the negligent conduct of the first actor renders him liable only when the court concludes that his negligence was a substantial factor in producing harm and that other considerations should not bar recovery.<sup>98</sup>

#### CALIFORNIA AND NORTH CAROLINA: A STUDY IN CONTRASTS

The conflicting results reached through the application of different concepts of proximate cause to cases involving intervening negligent acts offer conclusive evidence of the need for other criteria of liability. Decisions in a single jurisdiction are often in direct contradiction.<sup>97</sup> It has been said that the law is only a prediction of future results which may be reached by courts. If this is true, there is no law in this area of negligence.

A comparison of the treatment accorded the problem by the courts

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Co. v. Burk, 228 Ind. 162, 89 N.E.2d 905 (1950); Theurer v. Condon, 34 Wash. 2d 448, 209 P.2d 311 (1949).

<sup>95</sup> "Although in the great majority of cases to which the rule stated in this Section is applicable, the effects of the conduct of both the actor and the third person are in simultaneous active operation, it is not necessary that their operations shall be absolutely simultaneous. It is enough that the two are in substantially simultaneous operation, as when the effect of the conduct of one or the other has ceased its active operation immediately before the other's conduct takes active effect in harm to the other. RESTATEMENT, TORTS § 439, comment a. Cf., *Cassity v. Brady*, 182 Kan. 381, 321 P.2d 171 (1958).

<sup>96</sup> Compare *Edgerton v. H. P. Welch Co.*, 321 Mass. 603, 74 N.E.2d 674 (1947); *Hillyard v. Utah By-Products Co.*, 1 Utah 2d 143, 263 P.2d 287 (1953); *Theurer v. Condon*, 34 Wash. 2d 448, 209 P.2d 311 (1949), and *Phelps v. Woodward Constr. Co.*, 66 Wyo. 33, 204 P.2d 179 (1949), with *Jaggers v. Southeastern Greyhound Lines*, 34 F. Supp. 667 (M.D. Tenn. 1940), and *Smith v. United States*, 155 F. Supp. 605 (E.D. Va. 1957).

<sup>97</sup> Compare *Chadwick v. Popadick*, 390 Pa. 511, 136 A.2d 87 (1957), and *Coyne v. Pittsburg Railways Co.*, 393 Pa. 326, 141 A.2d 830 (1958) (allowing recovery), with *Listino v. Union Paving Co.*, 386 Pa. 32, 124 A.2d 83 (1956).

of California and North Carolina serves to crystalize the need for a re-evaluation of the "law" in this type of case. California undoubtedly takes a very liberal position in extending the scope of liability.<sup>98</sup> The usual result is that an actor whose negligence in any way contributes to the plaintiff's harm is held liable.<sup>99</sup>

In a recent California case,<sup>100</sup> the plaintiff, after alighting from a bus that had stopped in the middle of the street,<sup>101</sup> was struck by a negligently<sup>102</sup> driven automobile as she walked toward the curb.<sup>103</sup> She sued the owner of the bus and the motorist.<sup>104</sup> The jury returned a verdict against the bus owner. The trial court, however, entered judgment n. o. v. The Court of Appeals reversed and entered judgment for the plaintiff, holding that foreseeability of intervening act was unnecessary,<sup>105</sup> and that the two acts of negligence were concurrent proximate.

<sup>98</sup> It is believed that the writings of several eminent authorities in the field of negligence have materially influenced the California courts. See, Prosser, *supra* note 1; Carpenter, *Proximate Cause*, 14 SO. CALIF. L. REV. 1, 115, 416 (1940); 15 *id.* 187, 304, 427 (1941); 16 *id.* 1, 61, 275 (1948).

<sup>99</sup> See *Ferroggiaro v. Bowline*, 153 Cal. App. 2d 159, 315 P.2d 446 (1957); *Urland v. French*, 141 Cal. App. 2d 278, 296 P.2d 518 (1956); *Slippery v. San Diego Yellow Cabs*, 89 Cal. App. 2d 645, 201 P.2d 543 (1949); *McEvoy v. American Pool Corp.*, 32 Cal. 2d 295, 195 P.2d 783 (1948).

<sup>100</sup> *Parker v. City & County of San Francisco*, 158 Cal. App. 2d 597, 323 P.2d 108 (1958).

<sup>101</sup> "The bus was 10½ feet from the curb at its right. . . . Its left side was about nine inches from the center of the street." *Id.* at 600, 323 P.2d at 110. The bus driver was unable to park in the designated unloading zone because a truck was occupying part of the area. Evidence tended to show that he could have parked closer to the zone than he did, and that he violated a city ordinance in not parking as close to the curb "as practicable."

<sup>102</sup> The court assumes, without deciding, that the operator of the automobile was negligent.

<sup>103</sup> The plaintiff had just alighted from the front of the bus when she was struck.

<sup>104</sup> She also sued the owners of the automobile. A nonsuit was granted in favor of the automobile owners and the plaintiff dismissed without prejudice her suit against the automobile driver. The owner and driver of the truck that was parked in the unloading zone were also original defendants. Plaintiff, for the sum of \$40,000, entered into a covenant with them not to execute.

<sup>105</sup> The court states: "If the conduct of the person sought to be charged is a substantial factor in bringing about the harm, the fact that he neither foresaw nor should have foreseen the extent and nature of the harm, or the manner in which it occurred, does not prevent him from being held liable." It then goes on to say that: "Of course, one could not reasonably foresee that MacKay [the motorist] would lose control of his automobile and choose to run to the right of the bus rather than into the back of it or to its left. But certainly it was foreseeable that, if one parked the bus 10½ feet from the curb in a street so narrow that traffic proceeding in the same direction was barred, someone might if he lost control of his car drive to the right rather than to the left of the bus." *Parker v. City & County of San Francisco*, 158 Cal. App. 2d 597, 607-08, 323 P.2d 108, 114-15 (1958).

mate causes of the plaintiff's injury.<sup>108</sup>

On the other hand, an even more recent North Carolina case,<sup>107</sup> applying the doctrine of "insulated negligence," relieved the first negligent actor of liability. In this case, the complaint alleged that *D* negligently parked his unlighted automobile on a narrow road at night. The plaintiff, exercising reasonable care, saw the obstruction created by the negligence of *D*, and was able to stop just behind the wrongfully parked vehicle. Immediately thereafter, a second motorist, who had been closely following the plaintiff's car, negligently crashed into the rear of the plaintiff's car, which in turn hit the wrongfully parked car of *D*. The trial court entered a default judgment against *D*.<sup>108</sup> The North Carolina Supreme Court reversed the decision of the trial court, sustaining *D*'s demurrer *ore tenus*.<sup>109</sup> The court held as a matter of law that *D*, the first negligent actor, was not liable because the intervening negligent actor "independently and proximately" caused the plaintiff's harm.<sup>110</sup>

<sup>108</sup> *Id.* at 611, 323 P.2d at 117.

<sup>107</sup> *Howze v. McCall*, 249 N.C. 250, 106 S.E.2d 236 (1958).

<sup>108</sup> The court does not use the term "insulated negligence" in its opinion. It is apparent, however, that the doctrine is the basis for the decision. *Cf.*, *Atlantic Greyhound Corp. v. Hunt*, 163 F.2d 117 (4th Cir. 1947); *Hayes v. City of Wilmington*, 243 N.C. 628, 91 S.E.2d 673 (1956); *Montgomery v. Blades*, 218 N.C. 680, 12 S.E.2d 217 (1940); *Murray v. Atlantic C.L.R.R.*, 218 N.C. 392, 405, 11 S.E.2d 326, 335 (1940) (dissenting opinion); *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938); *Smith v. Sink*, 211 N.C. 725, 192 S.E. 108 (1937); *Williams v. Charles Stores Co.*, 209 N.C. 591, 184 S.E. 496 (1936); *Hinnant v. Atlantic C.L.R.R.*, 202 N.C. 489, 163 S.E. 555 (1932); Comment, *Torts—Insulating Negligence in North Carolina*, 33 N.C.L. REV. 498 (1955).

Both the driver of the parked car and McCall, the driver of the car that hit plaintiff's car, were original defendants. The plaintiff took a voluntary nonsuit on his cause of action against defendant McCall after Lyons failed to answer the complaint and a judgment by default and inquiry was entered against him.

<sup>109</sup> The plaintiff appealed the judgment of the trial court, which was for the sum of \$925, assigning various exceptions. The plaintiff's appeal was never ruled on, having been precluded by the action of the Supreme Court sustaining the defendant's demurrer *ore tenus*.

<sup>110</sup> *Howze v. McCall*, 249 N.C. 250, 255, 106 S.E.2d 236, 240 (1958). Chief Justice Winborne cites three cases in his opinion which he says contain the "controlling principles." The earliest, *McLaney v. Anchor Motor Freight*, 236 N.C. 714, 74 S.E.2d 36 (1953), merely repeats the "independently and proximately produced" test laid down in *Smith v. Sink*, 211 N.C. 725, 192 S.E. 108 (1937). *Hollifield v. Everhart*, 237 N.C. 313, 74 S.E.2d 706 (1953), adds nothing. In that case Justice Winborne states ". . . the factual situation . . . is similar to that of the McLaney case." It is submitted that the fact situations of the two cases are markedly different. He repeats the same "argument" in the third case cited, *Hooks v. Hudson*, 237 N.C. 695, 75 S.E.2d 759 (1953), and again in the *Howze* case. It appears that Chief Justice Win-

These cases, like many others involving intervening negligence, are irreconcilable.

#### CONCLUSION

Many suggestions have been made with respect to the problem of liability for negligent conduct where intervening negligence contributes to the resulting harm. None have won widespread approval. The dispensation of Professor Green, that all limitations on liability, except the requirement of actual causation, should be administered as part of some issue other than cause,<sup>111</sup> is certainly a logical starting point and would be a significant step in the right direction.<sup>112</sup> Perhaps the forth-coming revision of the *Restatement* will offer a solution to this perplexing problem.<sup>113</sup> So long as the issue of liability is determined in terms of causation, we can only speculate over the outcome of cases involving intervening negligent acts.

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borne in these cases is attempting to build up a line of decisions based not upon legal principles, but upon some policy that allows no more than a single wrongdoer to be held liable in cases of multiple causation in which one negligent act follows another. The court rationalizes that the two negligent acts were not concurrent because there would have been no harm to the plaintiff but for the negligence of the driver of the automobile following the plaintiff. This rationalization is grossly ineffective because, while it is true as a statement of fact, it can be as easily said that there would have been no harm to the plaintiff but for the negligence of the defendant. See, e.g., C.J.S. *Negligence* § 111 n. 33 (1950).

The *Howze* decision, as well as those cited as authority, does not so much as mention the concept of foreseeability, which has been long accepted in North Carolina as the principal test of proximate cause. See note 27 *supra*. It is submitted that the *Howze* decisions are contrary to the great weight of authority in North Carolina. See, e.g., *Price v. Gray*, 246 N.C. 162, 97 S.E.2d 844 (1957); *Riddle v. Artis*, 243 N.C. 668, 91 S.E.2d 894 (1956); *Hayes v. City of Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956); *Graham v. Atlantic C.L.R.R.*, 240 N.C. 338, 82 S.E.2d 346 (1954); *Baumgardner v. Allison Fence Co.*, 236 N.C. 698, 74 S.E.2d (1953); *Riggs v. Akers Motor Lines*, 233 N.C. 160, 63 S.E.2d 197 (1951); *Banks v. Shepard*, 230 N.C. 86, 52 S.E.2d 215 (1949); *Caulder v. Gresham*, 224 N.C. 402, 30 S.E.2d 312 (1944); *Montgomery v. Blades*, 218 N.C. 680, 12 S.E.2d 217 (1940); *Butner v. Spease*, 217 N.C. 82, 6 S.E.2d 808 (1940); *Kiser v. Carolina Power & Light Co.*, 216 N.C. 698, 6 S.E.2d 713 (1940); *Smith v. Sink*, 210 N.C. 815, 188 S.E. 631 (1936); *White v. Carolina Realty Co.*, 182 N.C. 536, 109 S.E. 564 (1921).

<sup>111</sup> GREEN, *op. cit. supra* note 79, at 200.

<sup>112</sup> Dean Green's treatment of the subject is by far the most rational, the most understandable, and the most worthwhile work in the field. It is as pertinent today as it was thirty years ago, perhaps more so. Any attempt to condense or capsule his analysis of the problem at this point would not do justice to his superb presentation. Rather, the book is unequivocally endorsed and supported.

<sup>113</sup> Cf., RESTATEMENT, TORTS § 281 and comments, especially comment *b* (Tent. Draft No. 4, 1958).