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CULPABLE INTERVENTION AS SUPERSEDING CAUSE *

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In dealing with questions of legal cause, or "proximate cause" as the cases generally say, the courts are confronted with two quite separate problems. The first involves primarily a question of fact and the application of physical laws to determine the answer. To a certain extent this process is scientific. The chain of events which stretches from the defendant's breach of duty (to the plaintiff) to the harm suffered by the plaintiff, is examined in the light of the laws of physics to determine whether there is an uninterrupted sequence of causes and effects. The determination of this question is for the trier of fact, except in those cases in which the facts and the inferences to be drawn from them are such as to exclude any reasonable difference of opinion. But in the great majority of cases there is no ground for a reasonable difference of opinion on this first question. No court would permit a jury to find that a careless motorist who struck an unnoticed pedestrian at a crosswalk did not cause the fractured tibia which immediately followed the impact. The causal relation is clear and the problem merely factual. So too, where it is clear that the plaintiff would have suffered the same harm even though there had been no breach of duty by the defendant, the court would not permit the jury to find that the breach of duty caused the harm.¹ In the determination of the first factual question the data must indicate, at least, that the defendant's conduct was a *causa sine qua non*. But while this

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1. RESTATEMENT, TORTS (1934) § 432. In one situation only is a different result reached, i. e., where there are two concurrent active forces each of which is alone sufficient to bring about harm to the plaintiff.

much is the minimum requirement, it may not be sufficient. Here enters the necessity, in the occasional case, for the trier of fact to exercise a degree of judgment in evaluating and weighing the facts. Although it is found as a fact that the plaintiff's harm would not have occurred but for the defendant's breach of duty to him, other causes which also contributed may have been so powerful or numerous, or both, that normal people studying the data would not consider the defendant's conduct to be a real substantial cause. Thus, in determining the first question the trier of fact must examine the data and ask, Was the defendant's conduct a "substantial factor" in producing the plaintiff's harm? This term, which was used by Professor Jeremiah Smith,² has been adopted in the *Restatement* with the explanation, "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense', which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense', yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes."³

But it should be emphasized that in answering this question the trier of fact is concerned entirely with ascertaining the facts by tracing the chain of cause and effect, just as a student of physics would follow the trail of a force he started in motion. It should also be emphasized that usually the causal relationship is clear. (Only occasionally is there room for a difference of opinion as to whether the defendant's conduct was a substantial factor. In those occasional cases the trier of fact goes one step beyond observing the data as to cause and recording the result of his observation, and exercises a judgment in determining the "substantial factor" question.

The second problem which must be dealt with in determining whether the defendant's conduct is the legal cause of the plaintiff's harm is entirely different. It does not relate to the finding of the physical facts and their causal interrelation at all. It involves the quite separate and far more delicate question of how far society should go in requiring the defendant to pay for damages which his conduct has in fact been a substantial factor in producing. This is primarily a question of substantive law.⁴ The proper solution calls for minds trained in the working out of rules of law which will reduce social friction to a minimum. It requires a trained and comprehensive sense of judgment. And because even trained and experienced judges may

2. SMITH, *Legal Cause in Actions of Tort* in SELECTED ESSAYS ON THE LAW OF TORTS (1924) 649, 711.

3. RESTATEMENT, TORTS (1934) § 431, comment a.

4. *Id.* at § 453.

differ on delicate social problems, much of the law relating to legal cause is beset with confusion and conflicting decisions. All too frequently the language of opinions serves only to obscure the real problem by discussing the two separate questions as one, and that a mere question of fact. Nor is clarity attained by the repetitious utterance of a ritualistic formula about "natural and probable consequences". But the proper determination of the case is aided by asking first, Can the jury (or other trier of fact) properly find as a fact that the defendant's conduct was a substantial factor in producing the plaintiff's harm? If the answer is no, that ends the plaintiff's case. If the answer is yes, the second question is, Is there any sound social reason why the plaintiff should nonetheless not have and hold his verdict? As the answer to the second question calls for an intuitive judgment, complete predictability of the answer of a court is impossible. During the past century, however, the courts in dealing with this second question have evolved certain rules of law which show definite trends. Cases involving the extent to which an intervening force⁵ constitutes a superseding cause⁶ are numerous. Intervening forces which consist of intervening human action have especially troubled the courts.

Assume, for example, that a municipal corporation, charged with a duty of maintaining a highway in a condition safe for travel, permits a defect to exist therein which constitutes a danger to travelers. A person driving a vehicle strikes this defect, loses control, and runs into a nearby pedestrian. That is a simple statement of the factual data. Considering the question of cause as a factual one, reasonable minds could well infer that the highway defect was a substantial factor in producing the harm to the pedestrian. When a court desires to know in addition whether the intervening actor acted innocently, or negligently, or wilfully, in order to determine the municipality's liability, the court is not concerned with this first question of causation at all. The actual chain of cause and effect in the eyes of the physicist cannot be affected by the mental state of the intervener. The play of forces in response to the operation of natural laws is not affected by whether an actor's conduct is to be denominated as innocent or tortious. What the court is concerned with in determining whether intervening human acts constitute a superseding cause is some rule of law which restricts liability short of requiring the defendant to pay for all the harm caused by his breach of a duty.⁷ Such a restrictive rule must be based upon some inarticulate or expressed no-

5. "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." *Id.* at § 441 (1).

6. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Id.* at § 440.

7. I BEVEN, *NEGLIGENCE IN LAW* (3d ed. 1908) 53. Note that Beven discusses Causal Connection under a separate heading at p. 82. The same point has been stressed by BOHLEN, *STUDIES IN THE LAW OF TORTS* (1926) 504.

tion of policy which motivates the court's action. Here, as in so many other places in the law of torts, there has been a great change in the attitude of the courts since 1800.

In the beginning of the 19th century innocent intervening human action did not ordinarily act as a superseding cause. But at about that time the "last human wrongdoer" rule came into existence. Text writers generally point to the *nisi prius* decision in *Vicars v. Wilcocks*,⁸ a slander case, as the origin of this doctrine. Briefly stated, the rule was that if after the defendant's wrongful conduct there intervened the wrongful (culpable) act of a third person, the latter relieved the defendant from liability, and "the last human wrongdoer" was solely responsible for the plaintiff's harm. As Beven and Bohlen have pointed out,⁹ this is really not a question of causation, but a rule of restrictive liability, quite apart from the question of causation. However, the courts, without distinguishing the two questions, have generally approached the last human wrongdoer rule as a part of the law of causation. Actually the rule indicated a belief on the part of the court that if the plaintiff had someone against whom he could get a judgment he should be satisfied. Further, it was generally easy of application and gave a desirable certainty to the law.

However, this rule soon began to crumble as it was artificial and often led to socially undesirable results. The fact that a second human wrongdoer has intervened and participated in causing harm to the plaintiff justifies a rule which permits a recovery against him, but it is difficult to understand why it should exculpate from liability the first wrongdoer, who has also participated in causing the harm.¹⁰

In 1886, when Sir Frederick Pollock came to write the first edition of his treatise on torts, he had this to say of the rule of *Vicars v. Wilcocks*: "But this doctrine is contrary to principle: The question is not whether C.'s

8. 8 East 1 (K. B. 1806).

9. See BOHLEN, *STUDIES IN THE LAW OF TORTS* (1926) 205.

10. As early as 1861, in *Lynch v. Knight*, 9 H. L. Cas. 577 (1861), the doctrine of *Vicars v. Wilcocks* was strongly criticized. In *Burrows v. March Gas & Coke Co.*, L. R. 7 Ex. 96 (1872), the court of Exchequer Chamber held that the intervening negligence of a person who carried a lighted candle into a gas-filled shop did not relieve the defendant from liability for harm to the plaintiff produced by the explosion. In *Clark v. Chambers*, L. R. 3 Q. B. D. 327 (1878), the defendant set up a *chevaux de frise* across a highway for the purpose of preventing vehicles from getting to his grounds where athletic sports were carried on. An opening was left in this barrier. Some unknown person came along and removed one of the barriers from the place where it had stood and placed it in an upright position in the footpath. The plaintiff, coming along in the dark, ran into the obstruction which had been placed on the footpath by the unknown third person, and lost his eye. The court permitted a recovery against the defendant, taking the position that even though the act of placing the barrier on the footpath was the intervening negligent act of a third person, this would not relieve the defendant from liability. In his opinion Chief Justice Cockburn reviews the English authorities, in particular, at p. 335, quoting from Justice Brett's statement in *Collins v. Middle Level Comm'rs*, L. R. 4 C. P. 279, 288 (1869): "... the primary and substantial cause of the injury was the negligence of the defendants; and it is not competent to them to say that they are absolved from the consequences of their wrongful act by what the plaintiff or someone else did."

[intervener] act was lawful or unlawful, but whether it might have been in fact reasonably expected to result from the original act of A. [defendant]. And, though not directly overruled, it has been disapproved by so much and such weighty authority that we may say it is not law."¹¹

In the meantime the American cases were similarly getting farther and farther away from the last human wrongdoer rule. In the leading case of *Lane v. Atlantic Works*¹² the court held that intervening negligent human conduct did not relieve the defendant from liability where such intervention ought to have been foreseen. It is not proposed to review here the American cases, as that has already been done by various writers. Suffice it to say that the 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. The imposing list of writers who have studied the problem have uniformly urged that the defendant be held liable for harm caused by foreseeable human intervention, regardless of whether it be innocent, negligent, or even criminal.¹³

Professor Bohlen has said, "The decided though perhaps not unanimous tendency of modern authority is to make the liability of the original actor depend not upon the negligence or even intentional wrongfulness of the subsequent act of a third party, which is the final decisive cause of the plaintiff's harm, and so upon the legal culpability of such act, but rather upon this,—whether or not, in view of the surrounding circumstances, and the conditions which the defendant's conduct may be expected to create, the third party's subsequent action was normal, and so, expectable. . . . There is normally no reason to anticipate wilful wrongdoing of others, but this bears only on the question as to whether the act is expectable or not. In exceptional situations even wilfully wrongful acts of others are normal and expectable."¹⁴

11. POLLOCK, *TORTS* (Am. ed. 1887) 161-162. The same statement appears down to and including the 12th edition, published in 1923. In the 13th edition (1929), at p. 246, the words "was or was not in a continuous or 'direct' line of consequence" have been substituted for "might have been in fact reasonably expected to result". The author explains that this change is the result of the decision in *Polemis' Case*, [1921] 3 K. B. 560.

Subsequently, in *Marshall v. Caledonian Ry.*, 1 Sess. Cas. (5TH SER.) 1060 (1899), the court held that intervening criminal conduct did not relieve the defendant from liability where such conduct could have been foreseen and the defendant's action created the opportunity for the criminal to enter and steal the goods.

12. 111 Mass. 136 (1872).

13. Beale, *The Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633, 644, 646, 650; Bingham, "Legal Cause" at Common Law (1909) 9 COL. L. REV. 16, 136, 154; Bohlen, *The Probable or Natural Consequences as the Test of Liability in Negligence* (1901) 49 U. OF PA. L. REV. 79, 86; Edgerton, *Legal Cause* (1924) 72 U. OF PA. L. REV. 211, 343, 374; McLaughlin, *Proximate Cause* (1925) 39 HARV. L. REV. 149, 178-183; Smith, *Legal Cause in Actions of Tort* (1912) 25 HARV. L. REV. 103, 118-125. See also Note (1928) 76 U. OF PA. L. REV. 720, 725.

14. BOHLEN, *STUDIES IN THE LAW OF TORTS* (1926) 504-505. He also says, at p. 335, n. 80: "The view that no one need foresee the misconduct of another, announced in *Vicars v. Wilcocks*, 8 East 1 (1806), has long since given place to the modern conception that every-

This view has been accepted by the American Law Institute in its statement that culpable human intervention is not a superseding cause unless it is in reality extraordinary.¹⁵

Developments in Pennsylvania

In view of the foregoing, the cases in Pennsylvania present an interesting though confusing source of study. Within the past few years a line of decisions has come down which constitutes a startling revival of the generally discarded doctrine of *Vicars v. Wilcocks*.¹⁶ This line of cases is all the more surprising in that it is based upon a statement by Wharton which was not accepted as good law in Pennsylvania during the half century which followed its first appearance. In his treatise on negligence he said: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces."¹⁷

Wharton's statement is clearly the last human wrongdoer rule of *Vicars v. Wilcocks*. As has already been pointed out, this case had been repudiated in England prior to 1874, and the general doctrine of the case had been very much whittled down in both England and America before that time and has since then been substantially repudiated in America, except in cases where the intervening negligent act is looked upon as extraordinary or the act is done in an extraordinarily negligent manner, e. g., reckless conduct. Indeed, for many years the Pennsylvania courts have generally held that not even in-

thing, which is, in fact, likely to occur, is legally foreseeable." More recently Professor Bohlen has written: "The earlier of two wrongdoers, even though his wrong has merely set the stage on which the later wrongdoer acts to the plaintiff's injury, is in most jurisdictions no longer relieved from responsibility merely because the later act of the other wrongdoer has been a means by which his own misconduct was made harmful. The test has come to be whether the later act, which realized the harmful potentialities of the situation created by the defendant, was itself foreseeable." Bohlen, *Fifty Years of Torts* (1937) 50 HARV. L. REV. 1225, 1229.

15. RESTATEMENT, TORTS (1934) §§447-449.

16. There have been occasional similar revivals of this doctrine, as for example in *Singleton Abbey v. Paludina*, [1927] 1 A. C. 16. This particular decision has been trenchantly criticized in a Note (1928) 76 U. OF PA. L. REV. 720.

17. WHARTON, NEGLIGENCE (1st ed. 1874) § 134. Courts which have quoted this passage generally overlook Wharton's further statement, at § 145: "if such subsequent negligence was likely, in the usual and natural order of things, to follow from the defendant's negligence", the latter is not relieved of liability. However, Wharton's book clearly indicates that he is viewing what is "likely" from roseate Utopian heights, where men are never, or hardly ever, negligent, and never, never intentionally bad.

dependent intervening forces¹⁸ are superseding causes, except in those cases in which the court looked upon the operation of the force as extraordinary.¹⁹

When Wharton wrote his book, the modern law relating to actions based on negligence was in its infancy. Not for another thirteen years was the first edition of *Pollock on Torts* to appear, with its famous prefatory letter to Justice Holmes, saying, "the purpose of this book is to show that there really is a Law of Torts", and "The contention is certainly not superfluous, for it seems opposed to the weight of recent opinion among those who have fairly faced the problem".²⁰ The conceptual approach to tort cases which characterized the 19th century was still supreme. The courts had not yet drawn clear lines of distinction between the negligence issue (including negligence qua the plaintiff) and the cause issue. Wharton's entire chapter on "Causal Connection" shows an almost constant confusion of these two quite separate elements of a negligence action. Modern tort law and the 20th century functional approach to its problems had not yet come into being.²¹

Burrell Twp. v. Uncapher,²² the first case in which the Supreme Court of Pennsylvania specifically considered the legal effect of a true independent intervening negligent act by a human being, appeared in 1887, thirteen years after Wharton's book. In that case the township had negligently allowed the highway to remain in a dangerous condition by failing to guard a precipitous drop at the roadside. A third person negligently left a steam roller at the roadside, and it can be assumed that he had actual knowledge of the township's negligence since the unguarded precipice was in full view. Thereafter a second independent force intervened: a horse, pulling the plaintiff's carriage, took fright at the steam roller and ran over the bank. The appeal squarely presented to the court the question of whether the negligent intervening act was a superseding cause. The court said: "Thus in *Shearman & Redfern on Negligence*, 401, it is said: 'As a general principle, the fact that an injury to a traveler on a highway was caused by the combined effect of the unsafe condition of the road and the negligence of a third person, is no defense to the party who is bound to keep the highway in repair'." ²³ This

18. "A dependent, intervening force is one which operates in response to or is a reaction to the stimulus of a situation for which the actor has made himself responsible by his negligent conduct. An independent force is one the operation of which is not stimulated by a situation created by the actor's conduct. An act of a human being or animal is an independent force if the situation created by the actor has not influenced the doing of the act." RESTATEMENT, TORTS (1934) § 441, comment c.

19. See cases listed in RESTATEMENT, TORTS, PA. ANNOT. (1938) § 442.

20. POLLOCK, TORTS (Am. ed. 1887) vi.

21. Indeed, a comparison of this early treatise on negligence with the RESTATEMENT OF TORTS reveals a complete contrariety of statement as to many different rules of law. Wharton, for example, at § 150, cites with approval *Pennsylvania R. R. v. Kerr*, 62 Pa. 353 (1870), as representing the Pennsylvania law of causation, and this case has been repudiated on its facts by an unbroken line of subsequent Pennsylvania authority. For complete citation of cases see RESTATEMENT, TORTS, PA. ANNOT. (1938) § 441.

22. 117 Pa. 353, 11 Atl. 619 (1897).

23. *Id.* at 363, 11 Atl. at 620.

case has been so frequently cited as to be practically a leading case. It was followed by *Koelsch v. Philadelphia Co.*,²⁴ in which the defendant was negligent in permitting its gas main to fall into disrepair, with a resultant leakage of gas into the plaintiff's cellar. With knowledge of the presence of the gas, a third person went into the cellar and negligently lighted a match, causing an explosion and harming the plaintiff. The defendant, on appeal, argued that the intervening negligence was a superseding cause. In holding to the contrary the court said, "The concurrence of the presence of the gas and the lighting of the match, the negligence of the defendant with that of Walters, was necessary to and did cause the explosion. In such cases the injured party has his redress against either of the wrongdoers, or both" ²⁵

In *Trusty v. Patterson*²⁶ the defendant rented a car with defective brakes to a bailee. The defect was known both to the defendant and to the bailee. The latter negligently drove the car and, when the brakes failed to hold, struck the plaintiff. Here again a person with knowledge of the defendant's negligence committed an act of intervening negligence, but the court permitted recovery without specifically discussing whether an intervening negligent act is a superseding cause.

The foregoing cases are definitely contra to Wharton's statement quoted above, and similar views were expressed in *Wassel v. Ludwig*.²⁷

Such was the state of the authorities in Pennsylvania when *Stone v. Philadelphia*²⁸ was decided. According to the original record there was a hole in a street beside a trolley track, caused by the sinking of the paving, four or five inches deep, several inches wide, and running "for about four house fronts". It had existed for months. A person driving an automobile struck the hole, lost control of his car, and ran into the plaintiff, who was standing behind an ice wagon. The motorist testified, "I wanted to avoid this treacherous track which I knew was bad . . . I didn't know I would get caught. I thought I would get over the rut. . . . When I couldn't get out I applied the brakes." The city's appeal from a judgment against

24. 152 Pa. 355, 25 Atl. 522 (1893).

25. *Id.* at 364, 25 Atl. at 524. Wharton sets forth at § 146 the very factual situation which existed in the *Koelsch* case, and says: "But if B. has notice, or is bound to take notice, of the leakage, then B., in lighting the match in the cellar, is guilty of negligence, which breaks the causal connection between A.'s negligence in causing the leak and the explosion." It is clear that the *Koelsch* case is flatly contra to the view announced by Wharton.

26. 299 Pa. 469, 149 Atl. 717 (1930).

27. 92 Pa. Super. 341 (1928). On the other hand, in *South-Side Ry. v. Trich*, 117 Pa. 390, 11 Atl. 627 (1887), it was held that the active negligence of a horse car driver who started the car before the plaintiff had an opportunity to get safely on, causing her to fall off into the street, where she was immediately run over by a runaway horse, was not the legal cause of her injuries. It is at least doubtful that this case can be considered good law today. Cf. *Frankel v. Norris*, 252 Pa. 14, 97 Atl. 104 (1916), and *Smith v. Yellow Cab Co.*, 285 Pa. 229, 132 Atl. 124 (1926), in both of which cases the defendant was actively negligent, as in the *Trich* case, and where the court said that even intervening negligent human acts would not relieve the defendant from liability. Indeed, *O'Malley v. Laurel Line Bus Co.*, 311 Pa. 251, 166 Atl. 868 (1933), appears on its facts to be directly contra to the *Trich* case.

28. 302 Pa. 340, 153 Atl. 550 (1931).

it raised no question of legal causation. Consequently the court did not have the benefit of briefs or argument on this question. It was held that the motorist's intervening negligence relieved the city from liability for its negligent maintenance of the street. The court cited and approved the statement of Wharton quoted above and seemingly overlooked the fact that the doctrine there announced is contrary to the line of Pennsylvania cases cited above, none of which were referred to in the opinion. In fact the opinion did not cite a single Pennsylvania case dealing with intervening human negligence.

Unless the motorist's intervening negligence can be looked upon as highly extraordinary, this case is also contra to the rule stated in Section 447 of the *Restatement of Torts*. There can be no doubt that the defendant municipality did breach a duty owed to the plaintiff, and was therefore negligent toward him, by permitting the hole to remain in the highway for months. The duty of the municipality is not merely to acquaint travelers with the condition of the highway,—it is to exercise reasonable care to keep the highway in repair and safe for travel. There are numerous familiar decisions which have permitted travelers knowingly using dangerous highways to recover for harm suffered in the course of such use.²⁹ Consequently, it cannot be said that the fact that the motorist in the *Stone* case knew of the existence of the highway defect should in itself have relieved the municipality from liability. It is submitted that reasonable men could well find in the *Stone* case (and the jury had found for the plaintiff against the city) that the defect in the street was a substantial factor in bringing about the plaintiff's harm. Undoubtedly the conduct of the intervening motorist was also a substantial factor. If his conduct was negligent, he should be subject to liability for harm caused thereby. But that is no reason for relieving another tortfeasor of liability. It seems to the present writer that it is going very far to state arbitrarily that no reasonable man could find as a fact that the hole in the street was not a substantial factor in bringing about the plaintiff's harm. Certainly the average bystander who happened to see the automobile wheel strike the hole, and thereafter lunge forward out of control and hit the plaintiff, would feel that the presence of the hole had played an important part in causing the accident. If it be argued that the act of the motorist was a cause but for which the accident would not have happened, the same can be said about the hole. If it be admitted as a fact that a causal relationship did exist between the hole and the plaintiff's harm, then the *Stone* case should be viewed from the standpoint of the question, Is there any sound public policy which justifies a rule of law which exculpates from liability an admitted wrongdoer merely because a second wrongdoer has intervened and assisted in causing the plaintiff's harm? Or stated in other words, Should an admit-

29. See *RESTATEMENT, TORTS*, PA. ANNOT. (1938) § 473, comment b.

ted wrongdoer who has caused harm succeed in avoiding payment therefor merely because of the existence of another wrongdoer who may or may not be, and who frequently is not, financially responsible? If so, it would seem that the law is putting a premium upon prompt wrongdoing by rewarding the first wrongdoer with freedom from liability and penalizing the sluggardly wrongdoer, who does not enter the picture until later, by putting the whole responsibility upon him.

The *Stone* case was almost immediately followed by *Hoffman v. McKeesport*,³⁰ which, without discussion, followed the rule announced in the *Stone* case.³¹ The rule that an intervening negligent act operates as a superseding cause was also announced, by way of dictum, in *Welser v. United Gas Improvement Co.*³² It was reiterated in *Helmick v. South Union Twp.*,³³ in which the township was negligent in not guarding the roadside over which a negligently operated truck plunged, killing three passengers. The vehicle skidded on mud on the highway, and there is no statement in the opinion that the driver knew of the danger in time to avert the accident by the then use of reasonable care.³⁴ The rule was also reiterated in *Schwartz v. Jaffe*,³⁵ in which, although the intervening negligent motorist knew the road was under construction, he had no knowledge of the particular depression which was struck; and in *Murray v. Pittsburgh Athletic Co.*,³⁶ in which the *Restatement* was cited, although the charge of the court, approved in the opinion, was directly contra to the rule there stated.

On the other hand, in *Fehrs v. McKeesport*,³⁷ in which innocent intervening human action was involved, the court said, approvingly, "In 22 R. C. L. 129, it is said: 'In other words, where a defendant is guilty of negligence, which causes an injury, and the plaintiff is free from negligence contributing

30. 303 Pa. 548, 154 Atl. 925 (1931).

31. In view of the reliance placed upon Wharton's views of causation, it is interesting to note that three weeks after the *Hoffman* case the court decided *Grodstein v. McGivern*, 303 Pa. 555, 154 Atl. 794 (1931), which practically overruled *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244 (1891). See *RESTATEMENT, TORTS, PA. ANNOT.* (1938) § 385. The latter case had also relied upon and followed Wharton's theory of causation as applied to the liability of a contractor to a person not in privity of contract with him.

32. 304 Pa. 227, 155 Atl. 561 (1931).

33. 323 Pa. 433, 185 Atl. 609 (1936).

34. The effect of this decision is to limit the passengers to an action against the bus operator. It is interesting to note that this achieves the same result as that reached in the now thoroughly discredited case of *Lockhart v. Lichtenthaler*, 46 Pa. 151 (1863). There the defendant had negligently piled barrels too close to a railroad track. The plaintiff's carrier thereafter negligently ran into them, harming the plaintiff. The court held that the plaintiff's sole remedy was against his carrier. So too, the effect of the decision in the *Helmick* case is the same as though the court had applied the exploded theory of imputed negligence and had held that the bus driver's contributory negligence barred the passenger's recovery against the negligent township. The plaintiffs in the *Helmick* case can comfort themselves with the thought that though they were denied recovery it was not based on these long discarded rules.

35. 324 Pa. 324, 188 Atl. 295 (1936).

36. 324 Pa. 486, 188 Atl. 190 (1936).

37. 318 Pa. 279, 178 Atl. 380 (1935).

thereto, the fact that the negligence of a third person also contributed does not relieve the defendant from liability for his negligence.'"³⁸ Also, in *Darrah v. Wilkesburg Hotel Co.*,³⁹ which involved innocent intervening human conduct, the court approvingly quoted the entire black letter of Section 447 of the *Restatement of Torts*. The dicta in the latter two cases indicate a view which is inconsistent with the *Stone* case, and which is contrary to the statement in Wharton upon which the *Stone* case is based. The same view was followed in *Murtha v. Philadelphia*,⁴⁰ and *Anderson v. Supplee-Wills-Jones Milk Co.*,⁴¹ in both of which cases intervening negligent human action, which does not appear in the retrospect to have been extraordinary, was held not to be a superseding cause.

Another line of cases also developed following the *Stone* case, in which plaintiffs were permitted to recover although independent intervening negligent action by responsible human beings appeared. In these cases the Supreme Court repeatedly held, without any discussion of the causal question, and without any reference to the *Stone* case, that the negligent operation of an automobile in which the plaintiff was a passenger did not relieve from liability a defendant who had negligently left an unlighted automobile truck parked on the highway. Among these cases, *Janeway v. Lafferty Bros.*⁴² is difficult to reconcile on its facts with *Schwartz v. Jaffe*.⁴³ This line of cases is fully cited in *Kline v. Moyer*,⁴⁴ in which the court definitely restricts the rule of the *Stone* case to an intervening act of negligence committed after the intervening actor has become aware of the danger created by the defendant's antecedent negligence. In this case the court holds that an intervening negligent act is not a superseding cause, unless the intervening actor, having actual knowledge of the potential danger, thereafter acts in a manner which is unreasonably dangerous.⁴⁵

The opinion in *Kline v. Moyer* does not refer to *Burrell Twp. v. Uncapher*,⁴⁶ *Koelsch v. Philadelphia Co.*,⁴⁷ or *Trusty v. Patterson*,⁴⁸ in all of which cases plaintiffs were permitted to recover although the intervening negligent act had been committed after the intervener had actual knowledge of the potential danger created by the defendant's negligent conduct. It is consequently difficult, if not impossible, to state with precision the present

38. *Id.* at 282, 178 Atl. at 381.

39. 318 Pa. 511, 178 Atl. 669 (1935).

40. 112 Pa. Super. 426, 171 Atl. 399 (1934).

41. 119 Pa. Super. 386, 181 Atl. 368 (1935).

42. 323 Pa. 324, 185 Atl. 827 (1936).

43. 324 Pa. 324, 188 Atl. 295 (1936).

44. 325 Pa. 357, 191 Atl. 43 (1937).

45. Cf. *Helmick v. South Union Twp.*, 323 Pa. 433, 185 Atl. 609 (1937), in which liability was denied although it does not appear from the opinion whether the intervening actor knew of the danger in time to avert the accident by the then use of reasonable care.

46. 117 Pa. 353, 11 Atl. 619 (1887).

47. 152 Pa. 355, 25 Atl. 522 (1893).

48. 299 Pa. 469, 149 Atl. 717 (1930).

Pennsylvania law as to how far intervening negligent human conduct constitutes a superseding cause. The rule laid down in *Kline v. Moyer* appears to take the view that intervening acts which are "ordinary negligence" are not superseding causes, but that the latter consist only of continued negligent action in the face of a known danger. Such continued action in the face of a known danger is what the Pennsylvania cases dealing with trespassers on land have referred to as "wilful or wanton".⁴⁹ There appears, therefore, to be at least an intimation in *Kline v. Moyer* that an "ordinary" intervening negligent act is not a superseding cause, while that which the Pennsylvania courts have called a "wilful or wanton" intervening act is. In other words, only the latter kind of act may be deemed "extraordinarily negligent", and not foreseeable, while the former may be deemed a "normal response to a situation which the actor's negligent conduct is a substantial factor in creating",⁵⁰ for the results of which the actor should be subject to liability.⁵¹

As has been said, the decision in *Kline v. Moyer* appears quite definitely to restrict the broad rule laid down in the *Stone* case. Just how far the court intended to go is made difficult to determine by the fact that almost immediately after that decision the court handed down the decision in *Maguire v. Dougherty*.⁵² This case is quite distinguishable from *Kline v. Moyer* on its facts, but the opinion, without referring to the *Kline* case, said, by way of dictum: "In *Hoffman v. McKeesport* . . . this court held that if a party do an act which might naturally produce an injury to another, but, before any such injury results, a third person does some act or omits to perform some act which it was his duty to perform, and this act or omission of such third person is the immediate cause of an injury, which would not have occurred but for his negligence, the third person is responsible for the injury and not the party guilty of the first negligence; for the causal connection between the first act of negligence and the injury is broken by the intervention of the act or omission of the third party."⁵³ The quoted language announces an even more stringent doctrine of superseding cause than the now generally discarded last human wrongdoer rule. It not only states the last human wrongdoer rule without the limitation drawn in *Kline v. Moyer*, but further states that where a third person "omits to perform some act which it was his duty to perform", such omission may constitute a superseding cause. On the other hand, the well-nigh universal rule

49. *Cover v. Hershey Transit Co.*, 290 Pa. 551, 139 Atl. 266 (1927); *Peden v. Baltimore & Ohio R. R.*, 324 Pa. 444, 188 Atl. 586 (1936); *Reagan v. Reading Co.*, 126 Pa. Super. 175, 190 Atl. 412 (1937). For full citation of cases see RESTATEMENT, TORTS, PA. ANNOT. (1938) § 336, comment d.

50. RESTATEMENT, TORTS (1934) § 447, comment f.

51. With the distinction stated by the court in *Kline v. Moyer*, compare RESTATEMENT, TORTS (1934) § 466, comment g, distinguishing between a plaintiff's "casual negligence" and his "assumption of risk".

52. 326 Pa. 122, 191 Atl. 348 (1937).

53. *Id.* at 127, 191 Atl. at 350.

has been formulated in the *Restatement* to be "failure of a third person to perform a duty owing to another to protect him from harm threatened by the actor's negligent conduct is not a superseding cause of the other's harm." ⁵⁴

In view of the recent attitude of the Supreme Court of Pennsylvania with relation to intervening negligent acts, it is curious to note that in a number of cases the Pennsylvania courts have held that an intervening criminal act does not necessarily constitute a superseding cause.⁵⁵ In two cases in particular, the Superior Court has held that the intervening criminal act of stealing an automobile did not relieve the proprietor of the parking lot or garage from liability.⁵⁶ In the one case the court said, "If an intervening act which ought to have been foreseen, contributes to the original negligence, the original wrongdoer will not be excused; his negligence remains the direct cause of the loss." ⁵⁷

In the opinion of the writer it is to be hoped that the statement just quoted will become the prevailing rule in Pennsylvania. There is no sound basis for the further survival of the last human wrongdoer rule as applied to intervening negligent acts. The decision in *Kline v. Moyer* is a step forward in at least limiting the further application of this doctrine. The decisions of the Supreme Court of Pennsylvania prior to *Stone v. Philadelphia* afford ample authority to enable the court to accept fully the rule stated in Section 447 of the *Restatement*. In addition, this section has already been cited with approval by the Supreme Court in three recent decisions,⁵⁸ so that the court is in a position, if it sees fit so to do, to accept the *Restatement* rule completely.

Of course, in a case in which the intervening action so dominates the situation as to be the sole substantial cause of the harm which follows, the defendant's antecedent negligence is not a cause at all, as a matter of fact, and the defendant cannot be held liable for the plaintiff's harm, and this is so whether the intervening act be culpable or innocent. But where the defendant's negligence is in fact a substantial factor in bringing about the plaintiff's harm, the additional fact that some intervening negligent act is likewise a substantial factor should not relieve the defendant from liability under ordinary circumstances.

There will be occasional cases in which the intervening negligence is so unusual, and the nature of the harm which has been caused is so unlikely, that

54. RESTATEMENT, TORTS (1934) § 452.

55. See RESTATEMENT, TORTS, PA. ANNOT. (1938) §§ 448, 449.

56. *Baione v. Heavey*, 103 Pa. Super. 529, 158 Atl. 181 (1932); *Smith v. Cohen*, 116 Pa. Super. 395, 176 Atl. 869 (1935).

57. *Id.* at 398, 176 Atl. at 870. The court also quoted with approval the statement that "if, at the time of the original negligence, the criminal act could have been foreseen, the causal chain is not broken by the intervening criminal act." *Ibid.*

58. *Darrah v. Wilksburg Hotel Co.*, 318 Pa. 511, 178 Atl. 669 (1935); *Murray v. Pittsburgh Athletic Co.*, 324 Pa. 486, 188 Atl. 190 (1936); *Kline v. Moyer*, 325 Pa. 357, 191 Atl. 43 (1937).

the court's sense of justice will be shocked at the thought of asking the defendant to respond for the injury. Such a case is provided for in the cited section of the *Restatement*. There is no reason of policy, however, why the court should not view realistically the foreseeability of negligent intervention in the average case. The problem is quite different from that which confronts the court in determining whether a litigant has been guilty of negligence or contributory negligence. In passing upon the question of a motorist's negligence the Pennsylvania courts have said again and again that a person is not required to anticipate that other persons will act negligently. The same rule has been announced in passing upon the contributory negligence of motorists.⁵⁹ There is a sound basis for this rule, "since motor traffic would be unreasonably delayed unless motorists were permitted to act on such assumptions."⁶⁰ Furthermore, the defense of contributory negligence is at best a harsh one, particularly as administered in Pennsylvania. Any rule which mitigates the severity of the defense of contributory negligence has desirable social reasons to support it. In passing upon the question of contributory negligence the court may well say, for reasons of policy, that a motorist is not required to anticipate negligent conduct from another motorist until he actually sees him being negligent, even though it is a matter of common knowledge that enormous numbers of motorists are negligent every day in the year. On the other hand, there is no sound public policy which requires us to close our eyes to realities when considering the question of superseding cause. In such a case we are dealing with a man who is admittedly a wrongdoer, who has admittedly violated a duty which was created to protect the plaintiff from the harm which he has suffered. We are dealing with a man whose breach of duty to the plaintiff has been found to be a substantial factor in causing the plaintiff's harm. Normally the plaintiff is entitled to have such a man pay for it. Under such circumstances the intervening negligence should be extraordinary indeed before the defendant is permitted to escape from liability.

It is the settled policy of the law that the burden of the financial aspects of the plaintiff's loss should be lifted from his shoulders. The practical effect of the "last human wrongdoer" rule is to defeat this policy in many cases. The intervening negligent person may be unknown or beyond the reach of process. Frequently he is financially irresponsible. Why should the original wrongdoer bask in the protective warmth and financial security of an outmoded and artificial rule, while an innocent and injured plaintiff carries the burden of a loss which he had no part in producing but which the exculpated wrongdoer most certainly had?

59. See *RESTATEMENT, TORTS, PA. ANNOT.* (1938) § 302, comment *e*, § 290, comment *b*.

60. *RESTATEMENT, TORTS* (1934) § 302, comment *e*.

Opinions will naturally differ as to what sort of intervening human negligence is extraordinary or not expectable. In *Kline v. Moyer* the court took the position that it is not unexpected for a motorist to be negligent in driving his automobile in such a way as to be unable to stop within the assured clear distance ahead;⁶¹ but that it is unexpected, and would constitute a superseding cause, if the motorist after having knowledge of an obstruction in the road fails to exercise a then existing ability to avoid, by the exercise of due care, swerving to the other side of the highway and striking another car. However, there does not appear to be any great fundamental difference between that type of negligence which consists of inattention to one's surroundings so that the danger is not perceived in time to avoid it, and that type of negligence which consists of a failure to measure up to the standard of the reasonable man in taking proper steps to avoid an observed danger. It seems to be just as foreseeable that a person who sees a danger may be negligent in becoming more rattled, or in having a slower reaction time, than a reasonable man, as that a person may be negligent in failing to notice the danger in time to avert harm. In any event, there are at present numerous open questions in Pennsylvania as to the exact extent to which culpable human intervention constitutes a superseding cause, the answers to which must await future decisions of the appellate courts.

61. It is settled in Pennsylvania that this is negligence per se. See RESTATEMENT, TORTS, PA. ANNOT. (1938) § 285, comment d, for full citation of cases.