

Workable Rules For Determining Proximate Cause

(CONCLUDED)

PART III

PROXIMATE CONSEQUENCES

If all of the first eight requisites of legal liability which have been set out¹⁶⁹ are satisfied, we are then in a position to inquire if liability shall be further delimited by reason of the relation which defendant's act or omission of duty bears to the consequence for which it is sought to hold him liable and, if so, when and how far. The practically universal view is that defendant's act or omission of duty must not only be a cause in fact of the consequences for which it is sought to hold him liable, but also it must be a substantial factor or proximate cause. But to leave the problem with no more definite guide for its solution than that which is furnished us by the phrase, substantial factor, or proximate cause, is to leave it in a state of helplessness. The decisions have not left the law in this condition. They enable us to state some workable rules to determine when a cause in fact is substantial. In the first place if no cause intervenes between defendant's cause and the consequence, his cause must be treated as substantial. There are no cases which are not admittedly erroneous¹⁷⁰ which refuse to hold defendant's cause a responsible one in such case.

If a cause intervenes between defendant's cause and the consequence for which it is sought to hold him liable, defendant should not be responsible for the consequences of this intervening cause which would not have occurred without its intervention if he in no way caused or increased the chances of its intervention. In such case, defendant's force, though a cause in fact since it made possible the result, is clearly not a substantial factor in causing the consequences. On the other hand, if defendant foreseeably causes the new force or foreseeably increases the chances of the new cause intervening, he should not escape liability for the immediate consequences of the intervening cause on the ground that his act or omission was not a substantial factor. In these cases, the nature of the intervening cause makes no difference.¹⁷¹

¹⁶⁹ Pages 229-232, *supra*, in the March issue of the REVIEW.

¹⁷⁰ See *Ryan v. New York Central R. R.* (1866) 35 N. Y. 210 (repudiated outside state of New York). See discussion of non-liability for improbable consequences, pages 238-242, *supra* (Part I, Section II, E) in the March issue of the REVIEW, and notes 175-178, *infra*.

¹⁷¹ Pages 238-242, *supra* (Part I, Section II, E) in the March issue of the REVIEW.

This leaves the law to be stated in the cases where defendant's act or omission has unforeseeably caused or increased the chances of the intervention of the new cause. If the new force or cause is one which operates independently of defendant's cause, then defendant is not a proximate cause of the consequences which resulted from the intervening cause unless he could have foreseen its intervention at a time when he had such control of his own action as to have prevented the intervention of the new force. Defendant did not cause the new force, and if he could not have foreseen its intervention in time to have prevented it not only is the fault element lacking but it seems clear that defendant's cause should not be regarded as a substantial factor in producing the consequence of such intervening force. If the new cause is not independent of defendant's cause but dependent, *i.e.* was caused by it, then proximate cause will not exist if it was not foreseeable, except in particular situations where the operative effect of defendant's act in producing the intervening cause is still dominant as compared with that of the intervening cause. If there is no spontaneity or originality in the intervening cause it is much like the case of no intervening cause at all. Or if the intervening cause is an act in the nature of a forced option which was reasonable in character, defendant should not escape liability for the consequences of such act. Thus defendant's cause is a sufficiently substantial cause of even an unforeseeable consequence, resulting from an instinctive, automatic or impulsive response of an animal or a human being to defendant's act or from an act done in delirium proximately caused by defendant's act, as to be treated as the proximate cause of such consequence, or even where the intervening cause is the deliberate or voluntary act of a human being, if it is a reasonable and justifiable response done to avert threatened harmful consequences of the defendant's acts or to alleviate from them.

We summarize briefly these principles more specifically as follows: If no cause intervenes between defendant's act or omission of duty, its consequences are proximate. If a cause intervenes, consequences of it are not proximate unless defendant's act or omission of duty caused or increased the chances of its intervention. If the chances of the intervention of the new cause were foreseeably increased by defendant's act or omission, the consequences of the intervening cause are proximate. If the chances of the intervention of the new cause were not foreseeable, consequences of it are not proximate except where the intervening cause is (a) an instinctive, automatic, impulsive act of a human being or animal incited by defendant's act; or (b) a delirious act proximately caused by defendant's act; or (c) a compelled act; or a

deliberate or voluntary act reasonably done (d) to avert threatened harm, or (e) to extricate from a situation threatening harm, or (f) to rescue property or persons, or (g) to mitigate damages, or (h) to prevent the deprivation of rights, or (i) to defend oneself or another from attack.

I. No Cause Intervening

Consequences are proximate where defendant's positive wrongful act is a cause in fact and there is no new cause either in the form of a positive act or omission of duty intervening between his wrong and the consequence. This principle seems clear beyond the need of elucidation. To no other causal agency than that of defendant's can responsibility for the consequence be ascribed. If defendant's wrong is the only cause, it cannot be urged that defendant's wrong was not a substantial factor. If defendant is to be excused from liability, the basis of such excuse is some factor wholly unrelated to causation and should be treated under such head. Professor Beale expresses this principle of causation thus: "The immediate result of an active force is . . . the proximate result."¹⁷² Statements to this effect are frequent in the cases¹⁷³ and the decisions are unanimous,¹⁷⁴ except for the doctrine of the repudiated *Ryan* case which still obtains in New York,¹⁷⁵ or where

¹⁷² Beale, *Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633, 641.

¹⁷³ See *Milwaukee & St. Paul Ry. v. Kellogg* (1876) 94 U. S. 469, 475 ("When there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault and self-operating, which produced the injury."); *Christianson v. Chicago, St. Paul, Minneapolis & Omaha Ry.* (1896) 67 Minn. 94, 97, 69 N. W. 640, 641 ("Consequences which follow an unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate . . ."); *Stevens v. Dudley* (1883) 56 Vt. 158, 167; *Harrison v. Berkley* (S. C. 1847) 1 Strob. 525, 550 ("Where . . . consequences, not controlled by the unforeseen agency of a moral being, capable of discretion, and left free to choose, or by some unconnected cause of greater influence, a wrongdoer must generally answer, however small was the probability of their occurrence.")

¹⁷⁴ *State v. O'Brien* (1890) 81 Iowa 88, 46 N. W. 752; *Mathews v. Kansas City Ry.* (1919) 104 Kan. 92, 178 Pac. 252; *Hill v. Winsor* (1875) 118 Mass. 251; *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.* (1893) 158 Mass. 570, 33 N. E. 690; *Watson v. Rinderknecht* (1901) 82 Minn. 235, 84 N. W. 798; *Hahn v. Delaware, Lackawanna & Western R. R.* (1918) 92 N. J. L. 277, 105 Atl. 459; *Webb v. The Roine, Watertown, & Ogdensburg R. R.* (1872) 49 N. Y. 420; *Pollett v. Long* (1874) 56 N. Y. 200; *Solomon v. Branfman* (1919) 175 N. Y. Supp. 835; *Haverly v. State Line etc. R. R.* (1890) 135 Pa. 50, 19 Atl. 1013; *Stevens v. Dudley*, *supra* note 173; *Vosburg v. Putney* (1891) 80 Wis. 523, 50 N. W. 403; *Harrison v. The Great Northern Ry.* (1864) 3 H. N. C. 231, 159 Repr. 518; *Smith v. London & Southwestern Ry.* (1870) L. R. 6 C. P. 14.

¹⁷⁵ *Ryan v. New York Central R. R.*, *supra* note 170. Where a railway company negligently burns a building along its right of way and the fire spreads to

courts have confused existing with intervening cause¹⁷⁶ or, following the discredited rule of nonliability for improbable consequences, have held that there was no liability in the particular case because the consequences were unforeseeable.¹⁷⁷ Liability exists in this group of cases with few exceptions although the consequences were unforeseeable.¹⁷⁸ One of the commonest instances of liability for unforeseeable consequences is to be found in the cases where a person receives a most unexpected injury as a result of defendant's act by reason of the injured person's having a concealed condition, physical or economic, which brings a surprising result from defendant's wrongful act. A slight bodily impact, which would not produce perceptible damages to the ordinary person, may cause death to the man with a thin skull or a weak heart. The defendant, if his act was wrongful, does not escape liability for such injuries because they were not reasonably foreseeable.

In *In Re Polemis & Furness, Withy & Co., Ltd.*,¹⁷⁹ servants of the defendants who had chartered plaintiff's vessel negligently dropped a plank into the hold of the vessel. This struck off a spark into some petrol vapor which exploded causing complete destruction of the vessel. Defendants were held liable for the value of the ship although their servants could not have anticipated that the falling of the board would cause a spark and destroy the ship.

In *Hill v. Windsor*,¹⁸⁰ defendant's servants so negligently managed their tug as to bump violently into a fender of a bridge. The movement of the fender thus induced was communicated to some piles and from these piles to others upon which plaintiff was working, causing a plank forced between the upper ends of two piles to drop out and the piles to spring together and catch plaintiff, greatly injuring him.

other property, the New York courts confine liability to the first fire. See *Bird v. St. Paul Fire & Marine Ins. Co.* (1918) 224 N. Y. 47, 120 N. E. 86; *Beale, op. cit. supra* note 172, at 642, n. 29 citing cases.

¹⁷⁶ See the discarded case of *Hoag & Alger v. Lake Shore & Michigan Southern R. R.* (1877) 85 Pa. 293. The Hoag case has been rejected in Pennsylvania. See BOELEN, *STUDIES IN THE LAW OF TORTS* (1926) 24.

¹⁷⁷ *Payne v. Young* (Tex. Civ. App. 1922) 241 S. W. 1094; *Stephens v. Mutual Lumber Co.* (1918) 103 Wash. 1, 173 Pac. 1031.

¹⁷⁸ *Hill v. Windsor*, *supra* note 174; *Oil City Gas Co. v. Robinson* (1881) 99 Pa. 1; *Lords Bailiff-Jurats of Romney Marsh v. Trinity House* (1870) L. R. 5 Ex. 204; *In re Polemis and Furness, Withy & Co. Ltd.* [1921] 3 K. B. 560.

In *Howell v. Union-Buffalo Mills Co.* (1922) 121 S. C. 133, 137, 113 S. E. 577, 579, the court lays down the rule: "For proximate and natural consequences, not controlled by the unforeseen agency of a moral being, capable of discretion and left free to choose, or by some unconnected cause of greater influence, a wrongdoer must generally answer, however small was the probability of their occurrence."

¹⁷⁹ *Supra* note 178.

¹⁸⁰ *Supra* note 174.

Defendants were held liable although their servants did not see plaintiff and could not foresee this result. The force which defendant sets in operation may die down so that its operation is not perceptible and yet if it springs up anew and its identity as a cause in fact of the damages to plaintiff can be made out, defendant's force, in the absence of intervening forces, will be considered the proximate cause.¹⁸¹

In the *Restatement of the Law of Torts* by the American Law Institute^{181a}, a number of these cases where defendant is held liable for an unexpected result are explained, not as the result of the direct operation of natural forces set in operation by the wrongful act of defendant but upon a new and hitherto unheard of test, namely, "whether after the event and looking back from the injury to the actor's negligent conduct, it appears highly extraordinary that it should have brought about the injury." As a test to be used in the future, it is worse than worthless, and it certainly does not satisfactorily explain the cases already decided. *In re Polemis*^{181b} and most of the other cases discussed in this connection in the restatement are fine examples of cases where, it is submitted, most courts would, applying the test suggested, reach the conclusion that the result was extraordinary and defendant therefore not liable.

A. Time and Space Do Not of Themselves Make a Cause Remote.¹⁸²

A force makes no impact with time or space; it is neither diminished nor deflected thereby. It is only by impingement on other forces that a force is retarded or changed in direction. Space and time have no direct relation to the purely causal element. However, as the probability of causes intervening increases as time and space increase, they therefore become important factors in the matter of proof of cause and in determining culpability. The shorter the time and the narrower the space the less likelihood of intervening causes which may make the defendant's cause remote. If the intervention of space had been considered only in so far as it concerned proof of cause and culpability toward the interests invaded, the erroneous and elsewhere repudiated doctrine of the *Ryan* case would not exist today to the chagrin of New York lawyers.¹⁸³

¹⁸¹ *Hardy v. Hines Bros. Lumber Co.* (1912) 160 N. C. 93, 75 S. E. 855 (defendant's fire had died down but court held him liable); see *Haverly v. State Line Ry.*, *supra* note 174.

^{181a} RESTATEMENT NO. 8 OF THE LAW OF TORTS (Am. L. Inst. 1932) §308.

^{181b} *Supra* note 178.

¹⁸² *Western Union Telegraph Co. v. Preston* (C. C. A. 3d, 1918) 254 Fed. 229; *People v. Botkin* (1901) 132 Cal. 231, 64 Pac. 286; *Poepers v. Missouri, Kansas & Texas Ry.* (1878) 67 Mo. 715; SELECTED ESSAYS ON THE LAW OF TORTS (1924) 739; Beale, *op. cit. supra* note 172, at 642.

¹⁸³ Judge Cardozo's statement in *Bird v. St. Paul Fire & Marine Ins. Co.*, *supra* note 175, at 52, 120 N. E. at 87, that ". . . it is impossible to set aside as

II. Intervening Causes — General Principles

A. Existing Distinguished from Intervening Causes.

There is usually little difficulty experienced in distinguishing an existing from an intervening cause. In general no force set in operation after defendant has lost control of his force can be an existing cause. If it is a cause at all it must be an intervening one. But this simple and apparently universal principle needs qualification. A force operating when defendant's force is set in motion is usually an existing force. If, however, such force were an active force moving into the range of defendant's force after defendant has lost control it may be treated as an intervening force if defendant did not know or was not in a position where he should have known of its operation before he lost control of his force. If the force was operating and within the range of encounter with defendant's force before defendant lost control of his force it will be treated as an existing force whether defendant knew or should have known of its existence when he was still in control of his force. For example, a wind, which springs up after defendant sets a fire and leaves it, is an intervening force,¹⁸⁴ if the wind was blowing elsewhere but came into range of defendant's fire after he left it it would still be an intervening force if defendant did not or could not reasonably have foreseen it. If he saw or reasonably could have seen it, it would be a part of the existing circumstances. On the other hand, if defendant wrongfully struck the body of plaintiff and injuries resulted by reason of weakened but concealed internal conditions of the body, such as heart disease, this internal condition would be considered a part of the existing circumstances. Where the intervening cause is not a moving force but a stationary condition, whether it is intervening or existing depends entirely upon whether or not it was in existence before defendant lost control of the force he set in operation.¹⁸⁵

immaterial the element of proximity in space. The law solves these problems pragmatically. There is no use in arguing that distance ought not to count, if life and experience tell us that it does," is a perfectly sound statement when used with respect to the element of culpability, but it is clear that time and space do not of themselves affect the question of proximity of cause. The same comment may be applicable to the argument of Professor Edgerton in *Legal Cause* (1924) 72 U. OF PA. L. REV. 211, 268.

¹⁸⁴ *McVay v. Central California Investment Co.* (1907) 6 Cal. App. 184, 91 Pac. 745; *Toledo, Wabash & Western Ry. v. Muthersbaugh* (1874) 71 Ill. 572; *Marvin v. Chicago, Milwaukee & St. Paul Ry.* (1891) 79 Wis. 140, 47 N. W. 1123.

¹⁸⁵ Professor McLaughlin defines intervening force as follows: "An intervening force is a force which is neither operating in the defendant's presence, nor at the place where the defendant's act takes effect at the time of the defendant's act, but comes into effective operation at or before the time of the damage." McLaughlin, *Proximate Cause* (1925) 39 HARV. L. REV. 149, 159.

In *Regina v. Horsey*,¹⁸⁶ defendant wilfully set fire to a stack of straw in an enclosure in which there was also a barn, but not near to any dwelling house. While the fire was burning the deceased was seen and heard to shriek in the flame, and his body was afterwards found in the enclosure. It did not appear whether he had been in the barn or merely lying on or by the side of the stack. He was probably a tramp. There was no evidence how or when he came there, nor did the prisoner have any idea that any one was, or was likely to be, there. He was apparently much surprised to find that anyone was in the flame and wanted to save deceased. The court charged the jury that where a prisoner in the course of committing a felony caused the death of a human being, that was murder even though he did not intend it. If the jury should not be satisfied that the deceased was in the barn or enclosure at the time the prisoner set fire to the stack, but came in afterwards, then as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act. A verdict of not guilty was returned.

Courts occasionally have treated erroneously as intervening causes conditions existing at the time defendant acted. In *Hoag v. Lake Shore and Michigan Southern R. Co.*,¹⁸⁷ where defendant's engineer negligently ran into a slide and his engine was thrown off the track along with some cars of oil, which took fire, the fire was carried down a creek, then swollen by rain, for several hundred feet to plaintiff's property, which it burned. The court said that the water was an intervening agent which carried the fire, but it nowhere appears that the water arose after the negligent act of defendant's engineer, or was not and should not have been known to him before he lost control of the situation. Apparently there were no new intervening causes after defendant's wrongful act; they were all a part of the existing conditions when he acted. In *Nunan v. Bennett*,¹⁸⁸ where defendant had turned the water off in an apartment house in the evening and then turned it on again in the morning, it was said that the leaving the faucets open late at night by the occupant of one of the apartments was an independent and intervening cause which relieved defendant of liability for injury to plaintiff's property. But if there was any wrongful act of defendant, it was in turning on the water in the morning without due care to see that the faucets were closed. No new cause intervened after that. In *Gaupin v. Murphy*,¹⁸⁹ where defendant drove a truck negligently at

¹⁸⁶ (1862) 3 F. & F. 287, 176 Eng. Re. 129.

¹⁸⁷ *Supra* note 176.

¹⁸⁸ (1919) 184 Ky. 591, 212 S. W. 570.

¹⁸⁹ (1928) 295 Pa. 214, 145 Atl. 123.

an excessive rate of speed past a school ground where school children were playing, and a rope which at one end was wrapped around the wrist of plaintiff's daughter and lying free at the street end became tightly wedged in the corrugations of the front tire and jerked the child into the path of the rear wheel, which crushed her, it was said there was no proximate cause, for there intervened between the remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury, namely, the rope. If the excessive speed was a cause in fact of the rope's getting caught and jerking the child into the path of the rear wheel, there should be no difficulty in finding proximate cause. The rope was clearly a part of the existing conditions when defendant acted.¹⁹⁰

In *Morris v. Omaha & Council Bluffs Street Ry.*, where a street car stopped and let the plaintiff off at a regular stopping place and plaintiff took several steps in the street, walked into a depression, fell, and was injured, the court said:¹⁹¹

"There was a new and independent cause intervening between the negligent act charged and the injury. . . . The hole in the street was the proximate cause of her injury. . . ."

Clearly this was an erroneous point of view; the hole was a stationary existing condition and not a new intervening cause.

The physical condition of one who is assaulted is an existing cause, not an intervening one.

1. Inanimate Forces of Nature Set in Operation by Defendant's Act Not an Intervening Cause.

Suppose defendant shoots a gun which causes a tree to fall or starts a snow slide or results in exploding some dynamite. Should such natural

¹⁹⁰ Possibly there was no breach of duty in this case, or the negligence may have consisted in exposing the children to a particular hazard which was not the one from which the injury arose. The negligence of the driver consisted in subjecting the school children to the hazard of being struck, not caught and pulled under the car. RESTATEMENT NO. 4 OF THE LAW OF TORTS (Am. L. Inst. 1929) §165, comment (e).

¹⁹¹ (1922) 193 Iowa 616, 619, 187 N. W. 510, 512; see *Lehman v. Maryott & Spencer Logging Co.* (1919) 108 Wash. 319, 184 Pac. 323.

In *Mendelson v. Davis* (C. C. A. 8th, 1922) 281 Fed. 18, where a carrier, by a violent jerk, threw plaintiff through an open trap door in a vestibule train, which had been wrongfully left open by a stranger, the court spoke of the open door as a new intervening force which made defendant's jerk a remote cause. This was clearly wrong, but the decision in the case may properly be defended on another ground.

In *Pullman Palace Car Co. v. Barker* (1878) 4 Colo. 344, where a woman who was "unwell" at the time, was driven out of a sleeping car by its catching fire and caught cold and suffered subsequent injuries, the court held that plaintiff being "unwell" at the time, there was in her then physical condition an intermediate and independent cause of the subsequent illness which was remote and not the proximate result of defendant's negligence. Most courts treat internal conditions such as in the *Lehman* case as part of the existing set up and not as an intervening cause.

sequence be treated as an intervening dependent cause or merely as other natural sequences of a more continuous and uninterrupted character such as the flow of water, the spread of fire, or the pull of gravitation? A little thought will make it apparent that it is impossible to draw a line of distinction between these different sorts of natural sequences.¹⁹² A dependent intervening inanimate force of nature should not be treated as a new intervening cause, but as an existing cause. In any event whether the new transformation of inanimate force is treated as an existing or as an intervening dependent cause the overwhelming weight of authority imposes liability and this is true although the sequence was not foreseeable.¹⁹³ Where a person is injured by defendant's act and unexpected consequences follow by reason of that person having heart disease proximate cause is found where there is no intervening cause.¹⁹⁴ Where an automobile driver negligently collided with a push cart which in turn struck and injured plaintiff, the driver's act was held the proximate cause of plaintiff's injury.¹⁹⁵ The movement of the push cart was not an intervening cause that made defendant's act remote.

One who had a box of tools on his shoulder was struck and killed while attempting to pass in front of defendant's approaching train and the tools were sent flying. Some of them struck plaintiff and injured him. The court held the negligence of the train men was the proximate cause of plaintiff's injury.¹⁹⁶ The direct cause of the injury to plaintiff was put in operation by the force of the engine of defendant.

Where defendant permitted its telephone wire to hang across a highway so low as to interfere with traffic and plaintiff driving a wagon carrying a loaded gun was knocked off and injured by the gun's discharge, defendant's wrong was held a proximate cause.¹⁹⁷ The act of defendant was negligent because it was foreseeable that persons driving on the highway would get caught by the wire and injured. The sequences which followed after the foreseeable independent act were simply forces of inanimate nature set in operation by defendant's act and it made no difference that they were not foreseeable.

¹⁹² The distinction between direct and indirect which was so important in distinguishing the action of trespass from trespass on the case is too uncertain to use here.

¹⁹³ *Hill v. Winsor*, *supra* note 174; *Lords Bailiff-Jurats of Romney Marsh v. Trinity House*; *In re Polemis and Furness, Withy & Co. Ltd.*, both *supra* note 178.

¹⁹⁴ *State v. O'Brien*, *supra* note 174.

¹⁹⁵ *Solomon v. Branfinan*, *supra* note 174.

¹⁹⁶ *Hannmill v. Pennsylvania R. R.* (1894) 56 N. J. L. 370, 29 Atl. 151.

¹⁹⁷ *Walmsley v. Rural Telephone Ass'n of Delphose* (1917) 102 Kan. 139, 169 Pac. 197.

In *In re Polemis & Furness, Withy Co.*,¹⁹⁸ the servants of the charterers of a vessel negligently dropped a plank which fell into the hold of the vessel, where petrol was stowed, striking a spark which exploded the petrol and destroyed the vessel. There was no intervening cause here and defendant was held liable.

In *Robinson v. Standard Oil Co. of Indiana*,¹⁹⁹ where the defendant's servant negligently drove a truck upon a railroad track and it was struck by a train and hurled 30 feet, demolishing a waiting room and killing plaintiff's intestate, who was waiting for the train, it was held that defendant's negligent act was the proximate cause of the decedent's death.

There are striking cases *contra*. In *Engle v. Director General of Railroads*,²⁰⁰ a negligently driven train struck an automobile and threw it against a switch, opening the switch and causing the train to run onto the switch track and to plunge into some cars thereon, injuring the decedent, a passenger on the train. The court said that the "independent agency so intervening must be treated as the sole proximate cause of the injuries."²⁰¹

2. Bacterial Action Promoted as a Result of the Defendant's Act Not an Intervening Cause.

Where the intervening force is the operation of bacilli, should it not be treated the same as dependent transformations of inanimate forces of nature?²⁰² If the germs were in the body operating at the time the injury was received they would be treated as a part of the existing conditions and the defendant would not escape liability by reason of the fact that he did not and could not have known of the condition of the decedent's body. In most cases it is impossible to determine whether

¹⁹⁸ *Supra* note 178.

¹⁹⁹ (1929) 89 Ind. App. 167, 166 N. E. 160.

²⁰⁰ (1921) 78 Ind. App. 547, 133 N. E. 138.

²⁰¹ *Ibid.* at 552, 133 N. E. at 140. Twenty-one years previously the Indiana appellate court had decided in *Evansville & Terre Haute Ry. v. Welch* (1900) 25 Ind. App. 308, 58 N. E. 88, that a railway company was not liable for injuries received by a man standing on a platform of a railroad station by being struck by the body of another man which was hurled against him by a passing engine, on the ground that this extraordinary result was not foreseeable. See *Wood v. Pennsylvania R. R.* (1896) 177 Pa. 306, 35 Atl. 699, where defendants, negligently operating their engine, hit a woman and threw her body against plaintiff, injuring him, the court holding the consequences remote. But see a more recent Pennsylvania case, *Pittsburgh Forge & Iron Co. v. Dravo Contracting Co.* (1922) 272 Pa. 118, 116 Atl. 147, where defendant negligently threw a burning stick into a body of water covered with oil which took fire and spread to plaintiff's deck and burned it. The supreme court was of the opinion that foreseeability was not required.

²⁰² See McLaughlin, *op. cit. supra* note 185, at 164.

the germs were an existing or an intervening cause. Their operation is much like that of the blind inanimate forces of nature. Their presence and the conditions bring the result as a match and friction bring fire. Only in case the evidence shows the germs were introduced by some subsequent act or happening which in itself would constitute a new intervening cause should their operation have the effect of an intervening cause.

In *Clark v. New Amsterdam Casualty Co.*,²⁰³ the defendant insurance company was held liable upon an accident policy for a death that resulted immediately from a disease upon the ground that the disease was the result of the accident. Apparently the accident produced directly a lowered resistance in the body and bacilli in the intestines infected first the appendix and then the heart, and the insured died of myocarditis. The court does not trouble itself with an analysis of the physiological processes to determine whether the germs were present in the body or later came in through their own activity.

In *Larson v. Boston Elevated Ry.*,²⁰⁴ plaintiff had her hand caught in the sliding door of a car by reason of the negligence of defendant's servant, and although strong and well at the time, within six months developed tuberculosis. Damages were awarded for the tuberculosis. On appeal the court said that if the tuberculosis had been directly caused by the accident, or if the tubercular germs were in her system at the time, and by reason of the accident her general health was so reduced as to lower resistance to the toxic effect of those germs, then the accident was the cause of the tuberculosis, and that only in case the tubercular germs were introduced into her system after the accident by the operation of some other subsequent cause could it be said that the accident was not a cause of the tuberculosis.²⁰⁵

3. Mechanical Operations.

Mechanical operations which constitute a part of the condition of the premises are not treated as intervening causes, although they involve voluntary human acts done after defendant's force is set in operation. For example, if defendant's act results in throwing plaintiff against a wire which carries electric current turned on and off at

²⁰³ (1919) 180 Cal. 76, 179 Pac. 195.

²⁰⁴ (1912) 212 Mass. 262, 98 N. E. 1048.

²⁰⁵ For other cases of bacilli infection see *Armstrong v. Montgomery Street Ry.* (1899) 123 Ala. 233, 26 So. 349; *Great Western Power Co. v. Pillsbury* (1915) 171 Cal. 69, 151 Pac. 1136; *Bethlehem Ship Building Corp. v. Industrial Accident Comm.* (1919) 181 Cal. 500, 185 Pac. 179; *People v. Kane* (1915) 213 N. Y. 260, 107 N. E. 655; *Pullman Co. v. McGowan* (Tex. Civ. App. 1919) 210 S. W. 842; *Day v. Great Eastern Casualty Co.* (1919) 104 Wash. 575, 177 Pac. 650.

different times, the fact that such current is turned on at a point of time later than the defendant's act does not require it to be treated as an intervening cause any more than if a current ran regularly through the wire. This same result would hold for moving machinery although the particular movement of the machine which inflicted the injury was started by human intervention after defendant acted.

In *Byrne v. Wilson*,²⁰⁶ through the negligence of defendant's servant an omnibus containing Mary Byrne was precipitated into the lock of a canal and while therein, in an insensible condition, the keeper of the lock turned the water therein and she was drowned. It would be going too far to say the servant should have seen that his negligence would drown Mary Byrne, nevertheless the court properly held that defendant's servant's negligence act was the proximate cause of the drowning of Mary Byrne. If the canal had been full of water at the time the servant acted but that had been concealed from him, defendant would not escape liability. Forces which change the conditions of premises with more or less regularity although started by human agency, should be treated as a part of the conditions.

A case which the court considered similar to *Byrne v. Wilson* is *Southern Ry. v. Webb*.²⁰⁷ John W. Webb, while a passenger on defendant's train and about to take a seat in a passenger car, was thrown, by a sudden jerk of the train, through an open door onto the track, were, in an unconscious condition, he was run over by the train of another company which operated on the same track. The court held defendant liable and apparently they would have done so even though it appeared affirmatively that defendant could not have foreseen this intervening event.

4. Normal Use of the Body or Member Thereof, When Not an Intervening Cause of Additional Injuries.

If plaintiff receives bodily injuries, proximately caused by defendant's wrong, which make him more susceptible to diseases or other injuries, such diseases or other injuries received while the body is being used reasonably and normally and which would not have occurred but for the weakened condition are the proximate consequences of the defendant's wrong.

In *Cohen & Co. v. Rittiman*,²⁰⁸ where the health of plaintiff's daughter had been so undermined by the noxious odors and poisonous atmosphere created by defendant's works that it was contended that

²⁰⁶ (1862) 15 Ir. Com. Law Rep. 332.

²⁰⁷ (1902) 116 Ga. 152, 42 S. E. 395.

²⁰⁸ (Tex. Civ. App. 1911) 139 S. W. 59.

she was unable to resist an attack of malaria which caused her death, the court were of the opinion that if the evidence was sufficient to establish such causal relations the defendant would be liable.²⁰⁹ Where an injured person receives a wound and blood poisoning sets in naturally and without any apparent human act to produce it, the intervening blood poisoning is not a superseding cause.²¹⁰

Where plaintiff receives a broken bone through the wrongful act of defendant and afterwards re-breaks it by reason of its weakened condition while he is making normal, reasonable and prudent use of the member, such use is not treated as an intervening cause making the subsequent damages remote from the original wrong of the defendant.²¹¹

This seems to be a sound construction of the facts because normal and proper use of a member does not produce broken bones. The re-breaking is properly ascribed to the weakened condition resulting from defendant's act. This principle is not confined to the re-breaking of bones; it seems properly to extend to any injury resulting to any part of the body through a normal and reasonable use of the body. If the defendant should break the plaintiff's leg and by reason of the impaired nature of the leg and while using it reasonably and normally the plaintiff should fall and break his arm, it seems clear the defendant's wrong in breaking the leg should be treated as a substantial factor in causing the broken arm. *Salladay v. Town of Dodgeville*²¹² involves an interesting application of this principle. In that case, plaintiff was injured by reason of a defective highway which defendant was bound to keep up. About eight weeks after the injury, and before

²⁰⁹ See (1911) 60 U. OF PA. L. REV. 147. But see *Migliacco v. Public Service Ry.* (1925) 101 N. J. L. 496, 130 Atl. 9; (1925) 74 U. OF PA. L. REV. 194.

²¹⁰ *Hornby v. State Life Ins. Co.* (1921) 106 Neb. 575, 184 N. W. 84, (1922) 18 A. L. R. 113.

²¹¹ *Conner v. City of Nevada* (1905) 188 Mo. 148, 86 S. W. 256; *Phillips v. Holmes Express Co.* (1920) 229 N. Y. 527, 129 N. E. 901; *Wagner v. Mitten-dorf* (1922) 232 N. Y. 481, 134 N. E. 539; *Hoseth v. Preston Mill Co.* (1908) 49 Wash. 682, 96 Pac. 423; *Smith v. Northern Pacific Ry.* (1914) 79 Wash. 448, 140 Pac. 685; *Weiting v. Town of Millston* (1890) 77 Wis. 523, 46 N. W. 879.

The rule formerly was *contra* in Massachusetts (*Raymond v. City of Haverhill* (1897) 168 Mass. 382, 47 N. E. 101) but recent cases are in *accord* with the general rule. *Hartnett v. Tripp* (1918) 231 Mass. 382, 121 N. E. 17 (case said to be distinguished from *Raymond v. Haverill*); *Wilder v. General Motorcycle Sales Co.* (1919) 232 Mass. 305, 122 N. E. 319.

In *Vander Velde v. Village of Leroy* (1905) 140 Mich. 359, 103 N. W. 812, when an action was brought to recover for an injury alleged to have been sustained by the plaintiff by reason of a defective sidewalk, and it appeared that the plaintiff while recovering from the injuries was again injured by the slipping of the crutch he was required to use, the court held "the second injury was clearly outside the case declared upon." The jury should have been instructed that no damage should be allowed because of it.

²¹² (1893) 85 Wis. 318, 55 N. W. 696.

it had been cured, plaintiff became pregnant, which pregnancy caused the injury to be prolonged in its result. Plaintiff was allowed to recover for the entire damage even though they had been enhanced by the intervening pregnancy. The court said:

"It does not appear that her medical advisers gave her any caution to avoid sexual intercourse or even pregnancy, nor is there any evidence to show that she knew or understood the nature of her injury was such that it was prudent that she should do so. The mere fact that eight weeks after the injury pregnancy occurred, and when no caution in that respect appeared to have been given by her medical advisor, is not necessarily, and as a matter of law sufficient ground to justify a reduction of damages for the injury caused by the defendant's negligence, although the results of the injury may have been thereby prolonged or her recovery delayed."²¹³

Of course if plaintiff makes an unusual or improper use of the member, that will be treated as an intervening cause and if it was one which was unforeseeable, the injury resulting from such use will be remote.²¹⁴

B. Independent Distinguished from Dependent Causes.

An independent intervening cause is one which operates without respect to defendant's cause. It would have been operating when and where it did if defendant's cause was wholly out of the picture. In other words it is a cause which is not caused by defendant's act. If defendant delays a shipment of freight and then sends it forward and the train is struck by lightning and the freight destroyed, if we can properly assume that the lightning would have struck at that place if the train had not been there, it is clear that the lightning is an independent intervening cause. The independent intervening cause may be an act of a man or an animal as well as a natural force. If defendant negligently leaves an obstruction in the street and plaintiff drives along the street as he would have driven had there been no obstruction and runs into the obstruction, plaintiff's driving is an independent intervening cause.

A dependent intervening cause is one which is caused by the tortfeasor act. If the intervening act is stimulated or incited by defendant's act it will be dependent, but it need not be stimulated or incited, it is sufficient if it were merely caused by defendant's act. If defendant leaves his car parked on the traveled portion of a highway and an autoist using the highway in seeking to avoid hitting it side-swipes another car but would not have done so if defendant had properly parked his car, the intervening side-swiping was caused by defendant's parking his car as he did. It is a dependent intervening cause. If

²¹³ *Ibid.* at 327, 55 N. W. at 700.

²¹⁴ *Snow v. New York, New Haven & Hartford R. R.* (1904) 185 Mass. 321, 70 N. E. 205.

plaintiff's horse shies into defendant's car, the horse's shying will be an independent intervening cause if the horse was frightened by some one other than defendant, and defendant would not be a proximate cause of harmful consequences to plaintiff unless he could reasonably foresee the likelihood of such act. If defendant caused the horse to shy the shying will be a dependent intervening cause, and, if instinctive or automatic, he will be liable for the consequences although he could not foresee them.²¹⁵

C. Effect of an Intervening Omission.

Where defendant by his positive act sets in operation forces, or by his omission of duty, fails to stop the operation of forces, and plaintiff is injured thereby, he cannot claim exemption from liability on the ground that the injury would not have happened if some other person had not failed to do his duty, and thereby stopped the operation of the cause for which he was responsible.²¹⁶

If defendant negligently sets fire to a wood he cannot escape liability by showing that a tenant of the land failed in his duty to put out the fire.²¹⁷ Nor can a hospital escape liability for burning plaintiff who, while unconscious after an operation, is moved by his physicians into a bed containing a hot water bottle, because a nurse, employed independently, failed to remove the bottle.²¹⁸ A landlord, who leases a building with a roof pitching toward the street and with gutters out of repair so that water will fall on the sidewalk and freeze, is not relieved of liability to one who falls on the ice, although the lessee

²¹⁵ Pages 521-524, *infra* (Part III, Section IV, C, 1).

²¹⁶ *McDaniel v. State* (1884) 76 Ala. 1; *Payne v. Commonwealth* (1898) 20 Ky. Law Rep. 475, 46 S. W. 704; *Stevens v. United Gas & Electric Co.* (1905) 73 N. H. 159, 60 Atl. 848; *Derosier v. New England Tel. & Tel. Co.* (1925) 81 N. H. 451, 130 Atl. 145; *Wiley v. West Jersey R. R. Co.* (1882) 44 N. J. L. 247; *Wanamaker v. Otis Elevator Co.* (1920) 228 N. Y. 192, 126 N. E. 718; *Sider v. General Elec. Co.* (1922) 203 App. Div. 443, 197 N. Y. Supp. 98; *Harwell v. Columbia Mills* (1918) 112 S. C. 177, 98 S. E. 324 (master under duty to provide safe place to work; leaky ice-box required sand to be kept on floor; plaintiff slipped on floor and was injured when floor was free of sand; master's failure of duty proximate cause of injury although fellow servant of plaintiff failed to sand floor); *Franklin v. State* (1899) 41 Tex. Crim. Rep. 21, 51 S. W. 951; *Western Union Telegraph Co. v. Huffman* (Tex. Civ. App. 1919) 208 S. W. 183. The cases of *Fowles v. Briggs* (1898) 116 Mich. 425, 74 N. W. 1046 and *Missouri Kansas & Texas Ry. v. Merrill* (1902) 65 Kan. 436, 70 Pac. 358, *contra* in result to the rule stated above, are to be explained as cases in which the courts were holding defendant under no duty to plaintiff. *Howard v. Redden* (1919) 93 Conn. 604, 107 Atl. 509 is also *contra*.

The English law is in *accord* with the text. *Harrison v. Great Northern R. R.*, *supra* note 174; *Regina v. Holland* (1894) 2 M. & Roh. 351, 174 Eng. Re. 313.

²¹⁷ *Wiley v. West Jersey R. R.*, *supra* note 216.

²¹⁸ *Harber v. Gledhill* (1922) 60 Utah 391, 208 Pac. 1111.

had covenanted to repair and had failed to do so.²¹⁹ One who gives another a mortal wound cannot complain of the victim's failure to properly care for it as the cause of his death.²²⁰ The failure of a purchaser to inspect the brakes of a car purchased from a dealer who represents the car to be in proper condition to operate on the public streets is not a superceding cause of injuries resulting from defective brakes.²²¹

It is no doubt true that in nearly every case where the question has arisen an omission has been held not to constitute an intervening cause so as to render defendant's cause remote. In most of the cases in which the matter has been considered the omission of duty might be regarded as clearly foreseeable and the result is no different than if there had been a foreseeable intervening positive act. Suppose the intervening omission were unforeseeable, would defendant's cause be remote? Some cases have so held. In *Fowles v. Briggs*,²²² defendant lumber company loaded a flat car with lumber without having the lumber so fastened as to prevent it shifting. The railroad crew of whom deceased was a member were ordered to include this car in their train. The deceased went between the car of lumber and a box car for the purpose of coupling the two. When the car of lumber came in contact with the box car, the load shifted 25 inches and crushed plaintiff's intestate to death. It was the duty of the railroad to inspect the load, but it had failed to do so. It was held that defendant's act was not the proximate cause of the death for there was an intervention of a human agency, namely, the failure of the railroad to inspect the car of lumber.

A similar holding is found in *Kurtz v. Detroit, Toledo, & Ironland R. R.*²²³ A freight car in defendant's yard was dangerously defective due to a broken door fastening. Defendant, in transferring a number of cars to another railroad, was negligent in including this car in the group. The second railroad was negligent in accepting and not inspecting such defective car. Defendant's yard master, plaintiff's decedent, was caught between the open defective door and another car while assisting to move the train. In an action under the Federal Employer's Liability Act for the negligent killing of plaintiff's decedent, it was held that defendant was not liable because of the intervening negligence of the second railroad in failing to reinspect cars and in moving their engine without a signal at the time the deceased was killed.

²¹⁹ *Bixby v. Thurber* (1922) 80 N. H. 411, 118 Atl. 99.

²²⁰ *State v. Pell* (1909) 140 Iowa 655, 119 N. W. 154.

²²¹ *Flies v. Fox Brothers Buick Co.* (1928) 196 Wis. 196, 218 N. W. 855.

²²² *Supra* note 216.

²²³ (1927) 238 Mich. 289, 213 N. W. 169.

Defendant ejects his wife from the house in freezing weather and she lies where defendant left her and freezes to death. It has been held that defendant is not liable unless the wife's action was a probable one.²²⁴ It is submitted that if these cases are correct the result at least should not be reached on the ground of the absence of proximate cause. If plaintiff was guilty of negligence by her failure to act she would be barred by her own contributory negligence.

D. Effect of an Intervening Checking Force.

Where defendant sets in operation an active force which causes damage without the intervention of a new force the fact that some one attempted to stop the operation of his force but failed to do so does not prevent his force being the proximate cause of the damage. For instance, if defendant negligently starts a fire which a third person attempts to extinguish and leaves reasonably thinking he has done so, but the fire starts up again from sparks not destroyed, defendant cannot escape liability from the fire's later destruction which he would have been responsible for had the third person not intereved.²²⁵ Neither is defendant relieved of liability although he exercised reasonable care²²⁶ to stop the operation of a force which he negligently started. Nor does it relieve defendant of liability that the intervening person who fails to check defendant's force owed a duty to use reasonable efforts to do so.

Somewhat analogous is the case where defendant sets in operation a force which he expects to be checked by the conditions existing at the time he loses control over his force. Thus defendant, who shoots at a target and in so doing is negligent toward people travelling on a highway, because of the unreasonable risk of his hitting someone, is not relieved of liability on the ground that his act of shooting was not a proximate cause where someone in hiding removes the backing from the target by means of a concealed wire after defendant shoots, and the bullet, though it hits the bull's eye, passes through the target and injures plaintiff. It is clear that the force which defendant set in operation went straight to plaintiff's body without deviation and without any other force aiding. It would be futile to attempt to set up a system of legal cause that would refuse to treat defendant's act as not a responsible cause. The failure of an expected checking condition or cause cannot properly relieve defendant's cause of its effectiveness.

²²⁴ *Hendrickson v. Commonwealth* (1887) 85 Ky. 281, 3 S. W. 166; *State v. Preslar* (1856) 48 N. C. 421; see Beale, *Recovery for Consequences of An Act* (1895) 9 HARV. L. REV. 80, 85.

²²⁵ *Haverly v. State Line & S. R. Co.*, *supra* note 174.

²²⁶ *Ibid.*

Does the intervening checking force have greater efficacy where new forces must intervene subsequent to the checking force in order to produce injury? If the consequences would be proximate if no checking force intervened, do they become remote by reason of the intervention of the unsuccessful checking force? For example, if defendant hands a dangerous plaything to a child, he is negligent because he should foresee the intervening act of the child may result in the plaything doing him or someone else harm. If some intervening act of a third person restores a condition of safety, *i.e.* makes it improbable that the intervening act of the child will occur but it does nevertheless in fact occur thereafter, should defendant be held liable? If defendant's force has been so far checked that it requires a new and unforeseeable wrongful act of a human being or an unforeseeable independent force of nature to intervene to produce damage defendant's force should not be held to be proximate. If the chances of occurrence of the intervening act or acts, the foreseeability of which made defendant's act negligent in the first place, have been so far reduced or eliminated by the checking force that the chances of their occurrence are practically no greater than before defendant acted, the checking force should be treated as effective to relieve defendant of liability. The situation may then be no worse than if defendant had never acted.

If "defendant gives a child or leaves in his way a pistol, explosive cap, or something which by exploding would cause an injury, he is the proximate cause of any injury the child may do with it, so long as it remains in his hands."²²⁷ No checking force has intervened. Suppose, however, that the parent or guardian of the child hides the pistol, explosive cap or other thing so effectively that the parent or guardian cannot reasonably foresee that the child or others may get the dangerous thing, although the child does get it and is injured. In that situation, the act of the parent would in accordance with the decisions be treated as an effective check on the operation of the defendant's cause. Should any checking force less effective be sufficient to make defendant's act a remote cause?

Several cases relieve defendant of liability where an act of parent or guardian has intervened, although the intervention has not checked the operation of defendant's wrong to such an extent as to require a

²²⁷ SELECTED ESSAYS ON THE LAW OF TORTS (1924) 753, citing *Binford v. Johnston* (1882) 82 Ind. 426; *Chaddock v. Plunmer* (1891) 88 Mich. 225, 50 N. W. 135; *Anderson v. Newport Mining Co.* (1918) 202 Mich. 204, 168 N. W. 523; *City of Lubbock v. Bagwell* (Tex. Civ. App. 1918) 206 S. W. 371; *Beale, op. cit. supra* note 172, at 656; see also *Haverly v. State Line, supra* note 174; *Dixon v. Bell* (1916) 5 M. & S. 198, 105 Eng. Re. 1023; cases collected in Note (1929) 60 A. L. R. 434.

new unforeseeable act on the part of some third person to put the child again in possession of the dangerous instrumentality. Thus in *Carter v. Towne*,²²⁸ defendant negligently sold plaintiff, a boy of eight, some gun-powder. The boy took the powder home and his aunt put it in the cupboard for him. Later, with the knowledge of his mother, he fired some of the powder. Later, without the knowledge of anyone, he took some of the powder out and was injured. Held, that the injury was not the direct, or proximate, or natural or probable result of the sale of the powder, and the seller was therefore not liable to the child for the injury. In *Peterson v. Martin*,²²⁹ a suit for the benefit of an injured child, the fact that the father knew the boy had dynamite caps was held to make defendant's wrong remote, and in *Pittsburg Reduction Co. v. Horton*,²³⁰ parents permitting their son to have possession of explosives for about a week was held sufficient to break the causal connection between the defendant's wrong and the consequence.²³¹

It is believed that the following cases which require a more effective checking force to relieve defendant are sounder. Thus in *Mathis v. Granger Brick & Tile Co.*,²³² where defendant negligently left dynamite caps, and plaintiff, a boy, found one and put it in his pocket, and his mother, ignorant of its nature, removed it and placed it on a desk in the sitting room, her act was held not to make defendant's wrong remote from the injury the boy received in taking it again and causing it to explode by picking it with a hairpin. In *Henningsen v. Markowitz*,²³³ defendant, in violation of a statute, sold a thirteen-year-old boy an air rifle. When sent back by the boy's mother, defendant refused to receive it. The mother hid it but the boy and a companion found it after six months and in shooting at a target hit plaintiff in the eye. The court held that defendant's wrong was a proximate cause of the injury. If the mother failed to hide the rifle so effectively that it could not reasonably be foreseen by her that the boy or others could get it, the result reached accords with the rule previously stated.²³⁴

²²⁸ (1870) 103 Mass. 507.

²²⁹ (1917) 138 Minn. 195, 164 N. W. 813.

²³⁰ (1908) 87 Ark. 576, 113 S. W. 647.

²³¹ See *Pollard v. Oklahoma City Ry.* (1912) 36 Okla. 96, 128 Pac. 300.

²³² (1915) 85 Wash. 634, 149 Pac. 3.

²³³ (1928) 132 Misc. 547, 230 N. Y. Supp. 313.

²³⁴ Dean Leon Green, in discussing this case, said: "It would be thought that, having found that the defendant violated his duty under a positive law made for the protection of the plaintiff against the very sort of risk that had caused him hurt, the court would have been satisfied." Green, *Are There Dependable Rules of Causation?* (1929) 77 U. OF PA. L. REV. 601, 621. From Dean Green's discussion one would surmise that if the father took the rifle from the boy and sold it to another merchant who resold it and it had been stolen and used by the boy in question to inflict this injury, defendant would be liable. At least his discussion does not aid in determining any limits of liability in such case.

In *Diehl v. A. P. Green Fire Brick Co.*,²³⁵ where dynamite caps came into the possession of a seven-year-old boy through the negligence of defendant, the court held that the fact that the mother had taken the caps and after examination and discovery of their nature had negligently returned them to the boy, did not break the causal connection between defendant's negligence and the injury. There was no effective check on the operation of defendant's wrong.

In *Jackson v. Texas Co.*,²³⁶ defendant negligently let gas escape into a street near which children played and the father of the child who was injured filled the hole where the gas escaped and set up an inch pipe seven feet long to carry the gas above the heads of the children and warned them not to fool with the pipe. They did, however, and a child about six lighted the gas near the ground and plaintiff child was severely burned. It was correctly held, since it was reasonably foreseeable that the damage to children had not been eliminated, that defendant was the proximate cause of the injury.

In *Clark v. E. I. DuPont de Nemours Powder Co.*,²³⁷ defendant was engaged in the business of selling explosives and shooting gas and oil wells with high explosives. Defendant's employees, after shooting a well, carelessly left about a quart of solidified nitro-glycerine near the well. An employee of the contractor boring the well feared injury to himself or to other employees and took the explosive home with him. His mother protested about his keeping it near the house. He took it to an abandoned graveyard on the farm and placed it in a hole and partly covered it. About two years later children of plaintiff found it and were injured by its explosion. Defendant was held liable.

E. Several Intervening Causes.

Usually the cases do not involve more than one intervening cause. Where there is more than one intervening cause, do all the limitations pertaining to intervening causes apply to each such cause? An examination of the cases makes it apparent that apart from intervening checking forces it is important to consider only the final intervening cause, *i.e.*, the immediate cause of the injury. If defendant can, or cannot, as the case may be, reasonably foresee that his act will increase the chances of the intervention of the final independent cause or a cause of the genus which immediately produced the injury, we are not concerned that he could or could not foresee the causes which produced or intervened in advance of this final intervening cause.²³⁸

²³⁵ (1923) 299 Mo. 641, 253 S. W. 984.

²³⁶ (1918) 143 La. 21, 78 So. 137.

²³⁷ (1915) 94 Kan. 268, 146 Pac. 320.

²³⁸ See pages 492-496, 508-510, *infra* (Part III, Sections II, F, and IV, A).

For example in *Rucker v. City of Huntington*,²³⁹ defendant city negligently left a stone in the street and plaintiff's horse, taking fright at a street car, shied and swerved, causing the buggy to strike the stone and to throw plaintiff out. Defendant's negligence was held to be a proximate cause of plaintiff's injury, the court saying:

"Sudden swerving out of course or shying is one of the ordinary incidents of the driving of a reasonably safe and gentle horse. . . ." ²⁴⁰

The independent intervening act of the horse shying against the store was foreseeable. It was the immediate cause of the injury and it would make no difference what caused the horse to shy, or how unforeseeable such cause was.²⁴¹

In *Gulf, C. & S. F. Ry. Co. v. Ballew*²⁴² defendant railway company ran a special train, consisting of two engines, a baggage car and sixteen passenger coaches carrying a football squad and its supporters. The deceased was assistant manager of the team and had occasion to pass over the platform between the first and second coaches and while doing so the train broke in two causing him to fall upon the track where he was run over and instantly killed. Just prior to the accident several young men, passengers on the train, desired to pass through the rear door of one of the coaches about the middle of the train and finding the door locked lowered the movable glass panel at the top and attempted to crawl through the opening. One of them in doing so lost his balance and grabbed a lever or a cord which instantly applied the air brakes and parted the train. The jury found the couplings between the cars were defective and of insufficient strength for the purpose for which they were used and defendants were negligent in so using them and that this negligence along with that of the young man caused the death of

²³⁹ (1909) 66 W. Va. 104, 66 S. E. 91.

²⁴⁰ *Ibid.* at 105, 66 S. E. at 91.

²⁴¹ See *City Council of Augusta v. Hudson* (1894) 94 Ga. 135, 21 S. E. 289; *Turner v. Page* (1904) 186 Mass. 600, 72 N. E. 329; *Igo v. City of Cambridge* (1911) 208 Mass. 571, 95 N. E. 557; *Burrell Township v. Uncapher* (1887) 117 Pa. 353, 11 Atl. 619.

In *Corley v. Cobb County* (1917) 21 Ga. App. 219, 93 S. E. 1015, it was held, where a horse became frightened for an unexplained reason apart from any defect in the construction of the bridge, and escaped from the control of its driver, and while running violently across the bridge swerved to avoid the attempted interception of bystanders and was precipitated off the bridge into the water, that the unprotected character of the bridge was not a proximate cause of the injury, since the shying of the horse had nothing to do with the character of the bridge, and there were independent unforeseeable causes. The case may be correct on the ground that the county had not failed in any duty to plaintiff, but if it was foreseeable that a horse might swerve or shy off the bridge, defendant should not be excused on the ground of the absence of proximate cause simply because there were other independent intervening causes which were not foreseeable.

²⁴² (Tex. Civ. App. 1931) 39 S. W. (2d) 180, (1931) 80 U. OF PA. L. REV. 137.

the deceased. The court held that defendant was liable; the intervening act of the young man, so the court thought, was reasonably foreseeable. This seems to be carrying foreseeability to an almost absurd extent. However, the negligence of defendant in using the defective couplings consisted in foreseeing that the train might be pulled in two and passengers and possibly others be injured thereby. Clearly that should be sufficient. It should not matter how many unforeseeable intervening causes occurred previous to this ultimate foreseeable cause which directly produced the injury, no matter if they were necessary links in the chain of causation in fact.

In *Washington & Georgetown R. R. v. Hickey*,²⁴³ defendant horse car company negligently drove onto defendant's steam railroad tracks and while the car was on the track in front of a rapidly approaching train the gates were lowered so that defendant's horse car could not proceed. The delay caused a commotion on the car and plaintiff was pushed off and injured. Defendant horse car company attempted to escape liability on the ground that the injury was caused by the negligent lowering of the gates which intervening act could not reasonably have been foreseen by defendant's servant. The court held it was immaterial that defendant could not foresee the cause of the delay since he could, as a reasonable person, have foreseen the delay which was the more immediate cause of the injury. Defendant's negligence consisted in the foreseeability of intervening acts of the genus which immediately caused the injury and it does not matter that these foreseeable intervening acts were the result of unforeseeable intervening causes.

Where foreseeability is required to have proximate cause, proximate cause does not exist where the final intervening cause or a cause of the genus which intervened was not foreseeable.²⁴⁴ In the cases of both dependent and independent intervening causes where foreseeability is required to make the consequences proximate, if the final cause only was foreseeable, proximate cause exists.²⁴⁵

F. Defendant's Wrong Must Cause or Increase the Chances of Intervention of the Cause which Immediately Produced the Injury.

If the result would not have happened but for the operation of the final intervening cause and defendant's wrong did not cause or increase the chances of the intervention of that new cause, defendant's act should not be treated as a responsible cause.²⁴⁶ For example, the driving

²⁴³ (1897) 166 U. S. 521, 17 Sup. Ct. 661.

²⁴⁴ See pages 515-520, *infra* (Part III, Section IV, B, 2).

²⁴⁵ See pages 496-507, *infra* (Part III, Section III).

²⁴⁶ *Johnson v. City of Omaha* (1922) 108 Neb. 481, 188 N. W. 122.

of a car in excess of the statutory rate is not a responsible cause of the damage done the car by a tree being blown down on the car while it was passing thereunder.²⁴⁷

In *Central of Georgia Ry. v. Price*²⁴⁸ the wrongful carrying of a passenger beyond her destination by defendant's train conductor was not a proximate cause of an injury she suffered by the explosion of a lamp in her hotel room.

In *Louisville & Nashville R. R. v. Daniels*,²⁴⁹ defendant's running its train thirty-five miles per hour, in excess of the ordinance speed limit, is not the proximate cause of injury suffered by plaintiff, who was struck on the head by a mail sack thrown by a mail clerk, where plaintiff might with equal likelihood have been hit by the sack had the train not exceeded the lawful speed.

Foreseeability is of no significance if defendant did not increase the chances of the intervention of the force which directly produced the damage. For example, defendant, a carrier of lumber from point *A* to *B* which is not to go beyond *B*, can foresee that fire is equally likely to occur at point *A* or *B* or anywhere between those points and destroy plaintiff's shipment of lumber. If the carrier negligently delays shipment under those circumstances he has not increased the chances of the fire burning the lumber although he could foresee that the lumber was likely to be burned. He ought not to be held responsible because he has not by his act increased the chances of its intervention.²⁵⁰ With some exceptions to be discussed later, the cases almost universally hold that defendant is not liable where his wrong did not increase the chances of the independent intervening cause which immediately caused the injury.²⁵¹

Where a carrier negligently delays the transportation of goods and after such delay sends the goods forward and they are overtaken by a flood or a storm, or are struck by lightning, should the carrier be held liable? There is some conflict in the decisions.²⁵² In Alabama,²⁵³

²⁴⁷ *Berry v. Borough of Sugar Notch* (1899) 191 Pa. 345, 43 Atl. 240.

²⁴⁸ (1898) 106 Ga. 176, 32 S. E. 77.

²⁴⁹ (1924) 135 Miss. 33, 99 So. 434.

²⁵⁰ This is on the assumption that the carrier is not an insurer against such loss. See Thompson, *Relation of Common Carrier of Goods and Shipper, and Its Incidents of Liability* (1924) 38 HARV. L. REV. 28, 30, n. 7.

²⁵¹ See notes 258, 259, *infra*.

²⁵² See Note (1927) 46 A. L. R. 302.

²⁵³ *Alabama Great Southern R. R. v. Quarles & Couturie* (1906) 145 Ala. 436, 40 So. 120; *Central of Georgia Ry. v. Sigma Lumber Co.* (1910) 170 Ala. 627, 54 So. 205.

Illinois,²⁵⁴ Iowa,²⁵⁵ Minnesota,²⁵⁶ and New York,²⁵⁷ it is held that causal connection is not broken by the unforeseeable intervention of this Act of God. But much the greater number of jurisdictions in which the question has arisen have decided against liability unless the carrier by its wrong foreseeably increased the chances of the independent force intervening.²⁵⁸

²⁵⁴ *Wald v. Pittsburg, Cincinnati, Chicago & St. Louis R. R.* (1896) 162 Ill. 545, 44 N. E. 888; see *Tate v. Missouri Pacific Ry.* (1910) 157 Ill. App. 105; *E. M. Leonard Produce Co. v. Union Pacific R. R.* (1913) 180 Ill. 416.

²⁵⁵ *Green-Wheeler Shoe Co. v. Chicago, Rock Island & Pacific Ry.* (1906) 130 Iowa 123, 106 N. W. 498; see *Wood v. Chicago, Milwaukee & St. Paul Ry. Co.* (1886) 68 Iowa 491, 27 N. W. 473.

²⁵⁶ *Bibb Broom Corn Co. v. Atchison, Topeka & Santa Fe Ry.* (1905) 94 Minn. 269, 102 N. W. 709.

²⁵⁷ *Michaels and Sloman v. New York Central R. R.* (1864) 30 N. Y. 564; *Read v. Spaulding* (1864) 30 N. Y. 630; *Dunson v. New York Central R. R.* (N. Y. 1870) 3 Lans. 265.

In Nebraska there are dicta in two cases in *accord* with these decisions, but the shipments were, in each of these cases, negligently exposed to the flood, and there would have been liability if the court had adopted the contrary rule. In fact, the courts cite with approval a Missouri case as well as the Minnesota and Iowa cases.

²⁵⁸ It has been so held in Arkansas, Florida, Indiana, Kansas, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, Ohio, South Carolina, Tennessee, Texas, and Wisconsin.

Chicago, Rock Island & Pacific Ry. v. Miles (1909) 92 Ark. 573, 123 S. W. 775 (liability imposed where force was foreseeable); *Jonesboro, Lake City & Eastern R. R. v. Dunnivant* (1915) 117 Ark. 451, 174 S. W. 1187 (liability imposed where the force was foreseeable); *Seaboard Air Line Ry. v. Mullin* (1915) 70 Fla. 450, 70 So. 467; *Chicago & Erie Ry. v. Schaff Bros. Co.* (1917) 74 Ind. App. 227, 117 N. E. 869; *Rodgers v. Missouri Pacific Ry.* (1907) 75 Kan. 222, 88 Pac. 885; *Denny v. New York Central R. R.* (1859) 79 Mass. (13 Gray) 481; *Lazoo & Mississippi Valley R. R. v. Millsaps* (1899) 76 Miss. 855, 25 So. 672; *Moffat Commission Co. v. Union Pacific Ry.* (1905) 113 Mo. App. 544, 88 S. W. 117; *Laner v. St. Louis & San Francisco R. R.* (1906) 117 Mo. App. 453, 93 S. W. 851; *Lightfoot v. St. Louis & San Francisco R. R.* (1907) 126 Mo. App. 532, 104 S. W. 482; *Extinguisher Co. v. R. R.* (1904) 137 N. C. 278, 49 S. E. 208 (carrier not liable for loss of goods by fire where it was not negligent with respect to the fire); *Harris v. Norfolk R. R.* (1917) 173 N. C. 110, 91 S. E. 710 (carrier which negligently conducted its warehouse and negligently failed to remove goods from it before an unusual wind, even though the storm was an Act of God); *Daniels v. Ballantine* (1872) 23 Ohio St. 532; *Cincinnati, Hamilton & Dayton Ry. v. Meyers & Patty Co.* (1915) 4 Ohio App. 493; *Ferguson v. Southern Ry.* (1912) 91 S. C. 61, 74 S. E. 129; *Lamont v. Nashville & Chattanooga R. R.* (1871) 56 Tenn. (9 Heisk.) 58 (negligence with respect to the approaching danger apparently required); *Deming v. Merchants' Cotton-Press etc. Co.* (1891) 90 Tenn. 306, 17 S. W. 89; *International & G. N. R. R. v. Bergman* (Tex. Civ. App. 1901) 64 S. W. 999; *Gulf, C. & S. F. Ry. v. Texas Star Flour Mills* (Tex. Civ. App. 1912) 143 S. W. 1179; *Bell Lumber Co. v. Bayfield Transfer Ry.* (1919) 169 Wis. 357, 172 N. W. 955 (carrier held liable for negligently delaying the removal of forest products from a position of great fire risk); see *Michigan Central R. R. v. Burrows* (1875) 33 Mich. 6; *Clark v. Pacific R. R.* (1866) 39 Mo. 184. But see *Backhouse v. Sneed* (1908) 5 N. C. 174 (owner of a vessel was held to be an insurer against all loss except that caused by Act of God; here, a rudder apparently

The federal courts adopt the rule which prevails in a majority of states, and the carrier is held not liable when its negligent delay has merely made possible an injury by an unforeseeable Act of God, but for which the damage would not have occurred. The rule of the federal court is followed in all of the state courts where the injury occurred in inter-state commerce,²⁵⁹ irrespective of the rule which they apply in intra-state shipments.

Where the foreseeable chances of substantial deterioration or destruction of goods is constant, delay on the part of the carrier should be treated as a proximate cause of damages so resulting in fact.²⁶⁰

Where a carrier or bailee wrongfully fails to deliver goods entrusted to it and a fire or other unforeseeable cause intervenes and destroys or damages the goods, should this wrongful act be treated as the proximate cause of the loss suffered? The courts uniformly hold the carrier liable in such cases,²⁶¹ where the intervening cause is not an Act of God.²⁶²

sound, was rotten internally, and broken by the sea; *held*, defendant was liable, for the loss of the cargo was not by Act of God); *Ferebee v. Norfolk Southern R. R.* (1913) 163 N. C. 351, 79 S. E. 685 (company held liable where it piled boxes which might be caused to collide with the passing train by a usual wind, though the boxes did in fact collide by reason of an unusual wind); *Tuthill v. Norfolk Southern R. R.* (1917) 174 N. C. 77, 93 S. E. 446 (non-liability because of loss of goods being wholly due to an Act of God, and would have occurred without defendant's act).

²⁵⁹ *Ohio Salt Co. v. Baltimore & Ohio R. R.* (1917) 204 Ill. App. 376; *Dean v. Belt Ry. of Chicago and Chesapeake & Ohio Ry. of Ind.* (1918) 210 Ill. App. 220; *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Hayes* (1914) 181 Ind. 87, 103 N. E. 839, 104 N. E. 581; *Julius Kessler & Co. v. Southern Ry.* (1923) 200 Ky. 713, 255 S. W. 535; *Continental Paper Bag Co. v. Maine Central R. R.* (1916) 115 Me. 449, 99 Atl. 259; *Northwestern Consolidated Milling Co. v. Chicago, Burlington & Quincy R. R.* (1917) 135 Minn. 363, 160 N. W. 1028; *Dolan Fruit Co. v. Davis* (1923) 111 Neb. 322, 196 N. W. 168; *Barnet v. New York Central and Hudson River R. R.* (1918) 222 N. Y. 195, 118 N. E. 625, *rev'g* (1915) 153 N. Y. Supp. 374; *Hadba v. Baltimore & Ohio R. R.* (1918) 170 N. Y. Supp. 769; *Daniels v. Ballantine*, *supra* note 257; *Toledo & Ohio Central Ry. v. S. J. Kibler Bros. Co.* (1918) 97 Ohio St. 262, 119 N. E. 733; see *O. K. Display Fixture Co. v. American Ry. Express Co.* (1923) 201 N. Y. Supp. 266.

²⁶⁰ *Jacobson v. Suderman & Young Inc.* (C. C. A. 5th, 1927) 17 F. (2d) 253; (1927) 11 MINN. L. REV. 679.

²⁶¹ *Louisville & Nashville R. R. v. McGuire & Co.* (1885) 79 Ala. 395; *Richmond & Danville R. R. v. Benson* (1890) 86 Ga. 203, 12 S. E. 357; *Georgia R. R. & Banking Co. v. Phillips* (1894) 93 Ga. 801, 20 S. E. 646; *Jeffersonville R. R. v. Cotton* (1868) 29 Ind. 498; *Kansas City, Fort Scott & Gulf R. R. v. Morrison* (1886) 34 Kan. 502, 9 Pac. 225; *Union Pacific Ry. v. Moyer* (1888) 40 Kan. 184, 19 Pac. 639; *Burlington & Missouri River R. R. v. Arms* (1883) 15 Neb. 69, 17 N. W. 351; *Schaff v. Roach* (1925) 116 Okla. 205, 243 Pac. 976; *R. R. v. Kelly* (1892) 91 Tenn. 699, 20 S. W. 312; *Berry v. West Virginia & P. R. R.* (1898) 44 W. Va. 538, 30 S. E. 143; *Meyer v. Chicago & Northwestern Ry.* (1869) 24 Wis. 566.

²⁶² *Atchison, Topeka & Santa Fe Ry. v. Henry* (1908) 78 Kan. 490, 97 Pac. 465.

The result is one we should expect to find, for liability in such case rests upon doctrines peculiar to conversion or of the duty of public carriers. The carrier, as soon as it wrongfully refuses to deliver the goods, is guilty of conversion and would immediately be liable for the full value of the goods.²⁶³ A carrier is not excused for the loss of goods in its custody even though it is free from fault and did not cause the loss. The courts commonly say the carrier is an insurer against all loss except that caused by Act of God or a public enemy.²⁶⁴

III. Foreseeable Intervening Causes

Where defendant's negligence consists in the foreseeability, if he acts, of particular causes intervening to do damage, the cases with almost unanimity hold defendant's act to be the proximate cause of the damages which result from the intervention of such causes.²⁶⁵ Defendant is often held liable (for the injury inflicted by another car),²⁶⁶ or plaintiff barred of recovery, because of driving with defective brakes.²⁶⁷ A steamboat company furnishing a narrow gangplank without guard rails set at an angle of thirty degrees is bound to anticipate that passengers are likely to fall from it to their injury.²⁶⁸ One who causes the collection of a crowd or disorder therein being able to foresee that pushing, jostling, jamming, or disorder may occur to produce injury is a proximate cause thereof.²⁶⁹ One who makes a wrongful arrest of the owner of property left in an exposed position and refuses to permit the property to be cared for is the proximate cause of its loss if stolen.²⁷⁰

Where defendant can reasonably foresee that his act will cause or increase the chances of the final intervening cause producing injury he should be as responsible for such injury as if his own act directly

²⁶³ *Richmond & Danville R. R. v. Benson*, *supra* note 261.

²⁶⁴ WILLISTON, *CONTRACTS* (1920) §1089; Note (1924) 38 *HARV. L. REV.* 28, 30, n. 7.

²⁶⁵ *Herman v. Markham Air Rifle Co.* (D. C. E. D. Mich. S. D. 1918) 258 Fed. 475; *Barrett v. Southern Pacific Co.* (1891) 91 Cal. 296, 27 Pac. 666; *Royal Indemnity Co. v. Midland Counties Public Service Corp.* (1919) 42 Cal. App. 628, 183 Pac. 960; *Hale v. Pacific Tel. & Tel. Co.* (1919) 42 Cal. App. 55, 183 Pac. 280; *Rozycski v. Yantic Grain & Products Co.* (1923) 99 Conn. 711, 122 Atl. 717; *Mills v. Central of Georgia Ry.* (1913) 140 Ga. 181, 78 S. E. 816; *Toothaker v. Himes* (1922) 112 Kan. 304, 210 Pac. 1110. See Notes (1923) 26 A. L. R. 679; 37 *Ibid.* 587.

²⁶⁶ *McDonald v. Robinson* (1929) 207 Iowa 1293, 224 N. W. 820; Note (1929) 62 A. L. R. 1181.

²⁶⁷ Notes (1921) 14 A. L. R. 1339; (1929) 63 *ibid.* 403.

²⁶⁸ *Mawson v. Eagle Harbor Transportation Co.* (1928) 148 Wash. 258, 268 Pac. 595. See Note (1929) 59 A. L. R. 1355.

²⁶⁹ *Shafer v. Keeley Ice Cream Co.* (1925) 65 Utah 46, 234 Pac. 300, 38 A. L. R. 1531.

²⁷⁰ *Whitehead v. Stringer* (1919) 106 Wash. 501, 180 Pac. 486. See Note (1928) 50 A. L. R. 362.

produced it.²⁷¹ The nature of the intervening cause is a matter of indifference in this group of cases. It may be an independent inanimate force of nature as where a carrier negligently delays a shipment and increases the exposure of fruit or vegetables to freezing weather, or of a cargo to forest fire in summer.²⁷² The carrier does not escape liability where it may reasonably foresee it will increase the chances of the intervening occurrence. The intervening cause may be an independent deliberate act of a human being as where a gas company negligently allows gas escaping from a meter to accumulate in a kitchen closet located within three feet of a cookstove. It cannot avoid liability for injury resulting from an explosion where the gas was ignited from the fire in the stove although the lighting the fire in the stove was a wholly disconnected and independent cause. The servants of the gas company should reasonably foresee that their act will increase the chances of the fire in the stove producing injury.²⁷³

The act of an innocent vendee in reselling to plaintiff diseased hogs which he had purchased of defendant, who sold them to him with knowledge of their infection, is a foreseeable intervening act for the consequences of which defendant will be liable.²⁷⁴ Negligently leaving highly charged electric wires in a sagging condition, so that they could easily be pulled together, near a bridge where defendant knew boys were in the habit of fishing and in so doing getting their lines entangled in the wires, was held a proximate cause of injury to plaintiff, a boy who stopped on the bridge to watch others fish.²⁷⁵ A somewhat extreme case of intervening cause held to be foreseeable is that of *Mize v. Rocky Mountain Bell Telephone Co.*,²⁷⁶ where defendant telephone company negligently allowed a broken wire to fall across a power line and this carried an electric current through the telephone wire to a wire fence ten miles away and electrocuted a workman who touched the fence wire.

Where a number of merchants, including defendant, entered floats in an advertising parade, and a number of young women were placed

²⁷¹ See notes 264-270, *supra*; *Pastene v. Adams* (1874) 49 Cal. 87; *Rucker v. City of Huntington*, *supra* note 239.

²⁷² *Fox v. Boston Ry.* (1888) 148 Mass. 220, 19 N. E. 222; *Bell Lumber Co. v. Bayfield Transfer Ry.* (1919) 169 Wis. 357, 172 N. W. 955.

²⁷³ *McClure v. Hoopston Gas & Elec. Co.* (1922) 303 Ill. 89, 135 N. E. 43; *Fort Worth Gas Co. v. Cooper* (Tex. Civ. App. 1922) 241 S. W. 282; see Note (1923) 25 A. L. R. 262. But see *McGahan v. Indianapolis Natural Gas Co.* (1894) 140 Ind. 335, 37 N. E. 601.

²⁷⁴ *Skinn v. Reutter* (1903) 135 Mich. 57, 97 N. W. 152.

²⁷⁵ *Langevin v. Twin State Gas & Elec. Co.* (1925) 81 N. H. 446, 128 Atl. 681.

²⁷⁶ (1909) 38 Mont. 521, 100 Pac. 971.

on defendant's float in order to distribute candy to the crowd on either side of the street and where a crowd of young boys following this float and scrambling among the spectators for candy that was thrown from the float, surged toward plaintiff, knocking her down and causing injury, the lower court refused to submit the question as to whether defendant's acts were negligent, and if negligent, were the proximate cause of plaintiff's injury, to the jury. On appeal the court held that the refusal to submit the question of defendant's negligence and of proximate cause was error.²⁷⁷

Parking a truck along the side of a street with the sharp edge of mowing machine blades projecting in such a way that a bicyclist would likely run into them was held the proximate cause of an injury resulting to plaintiff, a bicyclist, running into them.²⁷⁸ Where defendant struck the deceased a blow on the head with the intention of killing him but the blow was not mortal and he left the deceased lying in the highway, where he was run over by an automobile and killed, the court held defendant guilty of murder on the ground that his death by the automobile was a probable consequence of his having left the deceased lying unconscious in the highway.²⁷⁹ The intervening act may be an act of an animal²⁸⁰ not in any way caused by defendant's act. Although the act is independent of defendant's act, *i.e.*, not caused in fact by it, the consequence is proximate if its intervention was foreseeably increased by defendant's act. It matters not whether it is impulsive, instinctive or deliberate, innocent or wrongful. Suppose defendant, in making a cellar, is negligent in not fencing the excavation and plaintiff in riding by some thirty or forty feet distant has her horse frightened by some cause not connected with defendant's work and the horse backs into the excavation, throwing plaintiff and injuring her. If this independent intervening act of plaintiff's horse is foreseeable, defendant's wrong is a proximate cause of plaintiff's injury.²⁸¹ One of the commonest instances of foreseeable intervening acts of

²⁷⁷ Shafer v. Keeley Ice Cream Co., *supra* note 268.

²⁷⁸ Judy v. Doyle (1921) 130 Va. 392, 108 S. E. 6.

²⁷⁹ People v. Fowler (1918) 178 Cal. 657, 174 Pac. 892.

²⁸⁰ Watts v. Southern Bell Tel. & Tel. Co. (1901) 100 Va. 45, 40 S. E. 107.

²⁸¹ La Londe v. Peake (1901) 82 Minn. 124, 84 N. W. 726. As an example of independent acts of animals, suppose gophers, pursuing their own habits of life independently of anything plaintiff has done, burrow a hole into an irrigation ditch, causing the water to break through into a sewer negligently constructed by defendant and to the damage of plaintiff's property. The act of the gophers is clearly independent of defendant's cause, nevertheless, if foreseeable, defendant's earlier act is a proximate cause of the damage. Case suggested in facts in Mesa City v. Lesueur (1920) 21 Ariz. 532, 190 Pac. 573, where the court held defendant liable without stressing the question of foreseeability of the acts of the gophers which should have been vital in such case.

animals is the fright or shying of horses. In practically all these cases defendant is held liable for the damage done by the horses' acts.²⁸²

A very common intervening act of a human being which is normally foreseeable is that if explosives or firearms or other dangerous things are left around places children frequent, a child will play with them and harm itself or others thereby. Where acts are foreseeable defendant is regularly held liable for the consequences.²⁸³

A few courts have held the intermeddling of boys with explosives was not, as a matter of law, foreseeable,²⁸⁴ where the question should either have been left to a jury or ruled *contra* as a matter of law.²⁸⁵ Other courts have held, without discussing the question of foreseeability, that defendant's negligent act in leaving the dangerous thing where children might get it was not a proximate cause of the consequences resulting from the children's playing with them.²⁸⁶

A. Negligent.

One of the commonest intervening human acts for which defendant is held liable is a negligent act. Consequences resulting in fact from defendant's act which occur only through a foreseeable intervening negligent act are proximate.²⁸⁷ Thus where the defendant left a truck

²⁸² *McLemore v. City of West End* (1909) 159 Ala. 235, 48 So. 663; *City of Joliet v. Shufeldt* (1893) 144 Ill. 403, 32 N. E. 969; *Bly v. City of Haverhill* (1872) 110 Mass. 520; *Smethurst v. Proprietors Independent Congregational Church* (1888) 148 Mass. 261, 19 N. E. 387; *Buckner v. Stockyards Horse & Mule Co.* (1909) 221 Mo. 700, 120 S. W. 766; *Quigley v. Delaware & Hudson Canal Co.* (1891) 142 Pa. 388, 21 Atl. 827; *Settlemyer v. Southern Ry., Carolina Div.* (1912) 91 S. C. 147, 74 S. E. 137; *Baldrige & Courtney Bridge Co. v. Cartvett* (1890) 75 Tex. 628, 13 S. W. 8; *City of Forth Worth v. Patterson* (Tex. Civ. App. 1917) 196 S. W. 251.

²⁸³ *Katz v. Helbing* (1928) 205 Cal. 629, 271 Pac. 1062; *Lombardi v. Wallad* (1923) 98 Conn. 510, 120 Atl. 291; *Sedita v. Steinberg* (1926) 105 Conn. 1, 134 Atl. 243; *Binford v. Johnston* (1882) 82 Ind. 426; *Eves v. Littig Construction Co.* (1927) 202 Iowa 1338, 212 N. W. 154; *Serviss v. Cloud* (1926) 121 Kan. 251, 246 Pac. 509; *Butrick v. Snyder* (1926) 236 Mich. 300, 210 N. W. 311; *City of Tulsa v. McIntosh* (1923) 90 Okla. 50, 215 Pac. 624; *Olson v. Gill Home Investment Co.* (1910) 58 Wash. 151, 108 Pac. 140; see *Notes* (1927) 49 A. L. R. 160 (leaving explosives accessible to children); (1929) 62 *ibid.* 833 (leaving building accessible to children).

²⁸⁴ *Hale v. Pacific Tel. & Tel. Co.*, *supra* note 265. *Horan v. Inhabitants of Watertown* (1914) 217 Mass. 185, 104 N. E. 464; *Stephens v. Blackwood Lumber Co.* (1926) 191 N. C. 23, 131 S. E. 314; *Perry v. Rochester Lime Co.* (1916) 219 N. Y. 60, 113 N. E. 529; *Pollard v. Okla. Home City Ry.* (1912) 36 Okla. 96, 128 Pac. 300.

²⁸⁵ See *Stone v. Boston & Albany R. R.* (1897) 171 Mass. 536, 51 N. E. 1, where the court took a surprising view as to the foreseeability of an intervening cause.

²⁸⁶ *Afflick v. Bates* (1899) 21 R. I. 281, 43 Atl. 539.

²⁸⁷ *United States v. Freeman* (C. C. 1st, 1827) 4 Mason 505 (not negligent); *Herman v. Markham Air Rifle Co.* (D. C. E. D. Mich. S. D. 1918) 258 Fed. 475; *Pastene v. Adams*, *supra* note 271; *Merrill v. Los Angeles Gas & Elec. Co.* (1910)

load of iron rails, negligently loaded, standing in the street, and a child negligently jolted some rails off onto plaintiff, another child, injuring him, the court held defendant liable, saying:

"The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen."²⁸⁸

Defendant sold a jug of sulphuric acid to a creamery and failed to label it poison as required by law and the acid jug was placed on a shelf with similar jugs containing buttermilk for employees and customers to drink. Plaintiff's son, a customer of the creamery, asked an employee if he could have a drink of buttermilk and the employee thought he had his eye on a jug of buttermilk near at hand and told him to help himself and the boy took down the acid jug, drank from it and died the next day. It was held that defendant was liable: he should have known that someone about the creamery was likely to pick up this jug and drink its contents.²⁸⁹

Where defendant lessor of a hotel with the duty of keeping the elevator in repair negligently allowed it to get out of repair so that if left unattended it would creep up, and an employee of the lessee negligently left the door ajar and the car unattended, with the place not properly lighted, and plaintiff walked into the well and was injured, defendant was held liable because the intervening negligence was foreseeable.²⁹⁰ Where defendant negligently left a pile of boards in a highway and a wagon loaded with barrels running over the boards caused them to rattle, frightening plaintiff's well broken horse and causing it to start suddenly, throwing plaintiff out of the wagon and injuring him, it was held error to non-suit plaintiff, that it should have been left to the jury to determine whether defendant might reasonably have anticipated such consequences.²⁹¹

Again, where defendant negligently left his team of horses unattended in the street and the horses wandered into the middle of the street and a stranger, in attempting to drive the horses back, caused the

158 Cal. 499, 111 Pac. 534; Cahill v. E. B. & A. L. Stone Co. (1914) 167 Cal. 126, 138 Pac. 712; Henry v. Dennis (1883) 93 Ind. 452 (not clear that intervening act was negligence); Lake Erie & Western R. R. v. McConkey (1916) 62 Ind. App. 447, 113 N. E. 24; Fishburn v. Burlington & Northwestern Ry. (1905) 127 Iowa 483, 103 N. W. 481; Daneschocky v. Sieble (1917) 195 Mo. App. 470, 193 S. W. 966; Cannon v. Lockhart Mills (1915) 101 S. C. 59, 85 S. E. 233; Fairbanks v. Kerr (1871) 70 Pa. 86; Rex v. De Marny [1907] 1 K. B. 388.

²⁸⁸ Lane v. Atlantic Works (1872) 111 Mass. 136, 139.

²⁸⁹ Burk v. Creamery Package Mfg. Co. (1905) 126 Iowa 730, 102 N. W. 793.

²⁹⁰ Colorado Mortgage & Investment Co. Ltd. v. Giacomini (1913) 55 Colo. 540, 136 Pac. 1039.

²⁹¹ Lake v. Milliken (1873) 62 Me. 240.

wagon to run against a car and overturn it against plaintiff and injure him, the court, in holding that defendant's negligence was the proximate cause of the injury, said:

"We think that one of the dangers to be fairly anticipated from leaving horses unattended in the street is that if they start to run off, the person who attempts to stop them may be careless or ignorant of the management of horses, and thus jeopardize the safety of people on the highway."²⁹²

In *Stemmler v. City of Pittsburgh*²⁹³ the court held that permitting holes to remain in the pavement and to become filled with water was the proximate cause of the loss of an eye by a traveler, because of gravel thrown into the eye when the wheel of a passing truck dropped into a hole. It is true that there would have been no injury had the wheel of the truck not thrown the stones and mud and water from the hole, and the splashing of it by reason of the wheels of passing vehicles dropping into it were causes or acts which could be foreseen as likely to intervene.

In *Clark v. Chambers*²⁹⁴ defendant, who was in the occupation of certain premises abutting on a private road, consisting of a carriage way and a foot path, which premises he used for the purposes of athletic sports, erected a barrier across the road to prevent persons from driving vehicles up to the fence surrounding his premises and overlooking his sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that defendant had no legal right to erect this barrier. Some person, without defendant's authority, removed a part of the barrier armed with spikes from the carriage way where defendant had placed it, and put it in an upright position across the footpath. Plain-

²⁹² *Williams v. Koehler* (1899) 41 App. Div. 426, 58 N. Y. Supp. 863. See *Henry v. Dennis*, *supra* note 287, where defendant negligently placed an open barrel of fish brine upon a public street in a city, where plaintiff's cow was lawfully running at large. A passerby poured the fish brine into the street. The cow licked it up from the street, was poisoned and died. Plaintiff now sues defendant for the loss of the cow. *Held*, that defendant's negligence in placing the barrel on the street was the proximate cause of the death of the cow. The court apparently proceeded on the ground that the act of the passerby in pouring out the brine should have been foreseen by defendant. See also *Birge v. Gardner* (1849) 19 Conn. 506; *Fishburn v. Burlington N. W. R. R.*, *supra* note 287; *Teasdale v. Beacon Oil Co.* (1929) 266 Mass. 25, 164 N. E. 612; *Shanley v. Hurley* (1922) 96 Vt. 119, 117 Atl. 250; *Dixon v. Bell* (1816) 5 M. & S. 198, 105 Eng. Re. 1023; *Illidge v. Goodwin* (1831) 5 Car. & P. 190, 172 Eng. Re. 934; *Lynch v. Nurdin* (1841) 1 Q. B. 29, 113 Eng. Re. 1041; *Murphy v. Great Northern Ry.* (1897) 2 I. R. 301. But see *Beckman v. The Seaboard Air-Line Ry.* (1906) 127 Ga. 550, 56 S. E. 638.

²⁹³ (1926) 287 Pa. 365, 135 Atl. 100; see Note (1927) 49 A. L. R. 1229.

²⁹⁴ (1878) L. R. 3 Q. B. D. 327.

eiff, on a dark night, was lawfully passing along the path when he ran into the spiked barrier and put out his eye. It was contended by defendant that the proximate cause of the injury was the act of the third person in removing the barrier and placing it across the footpath. It was held that defendant was liable in respect to the injuries occasioned by the spiked barrier to plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous implement from the carriage way and placing it in the footpath. The court said that the defendant should have foreseen in this case that the pole might have been removed by some third person and placed across the footpath.²⁹⁵ It would seem that the court went pretty far in holding that the defendant should have foreseen the intervening act of the third person in placing the spiked barrier across the footpath. It is submitted that even if it were unforeseeable, defendant should have been held liable, for the third person would have had to choose between suffering a deprivation of his rights or removing the barrier.²⁹⁶

Defendant's filling station attendant negligently jerked the handle of a gasoline pump in filling the car of which plaintiff was an occupant, and caused gasoline to be spilled over the car and the person of the plaintiff. The driver of the car cranked it with the coil-box and plaintiff was severely burned. It was held that even if the accident would not have happened but for the negligence of the driver, if his act ought reasonably to have been anticipated and guarded against, the act of spilling the gasoline should be found to have caused the accident.²⁹⁷ It would seem to have been enough that defendant should have foreseen that the gasoline might have been ignited.

A type of case where the foreseeability test might seem on first glance to be carried too far calls for special consideration. It is the case where defendant has by his tortious conduct caused bodily harm to another which makes the other helpless and creates a situation where third persons take advantage of the helplessness to do further bodily or property harm. It would be stretching the foreseeability test altogether too far to say that defendant ought, before he committed the tort, to have foreseen these intervening acts of third persons from which harm resulted to the victim, but it seems justifiable nevertheless to hold him liable for these consequences. The foreseeability test will, however, even in such case give the correct solution. As the law imposes an affirmative duty upon the tort-feasor, who has by his tort made

²⁹⁵ *Ibid.*

²⁹⁶ See pages 538-539, *infra* (Part III, Section IV, C, 4, e).

²⁹⁷ *Teasdale v. Beacon Oil Co.*, *supra* note 292.

another helpless, to use reasonable care to prevent further harm, the point of time at which defendant is required to foresee these intervening acts of third persons is not when he acted but the later period when the affirmative duty of care arose. *Brower v. New York Central & Hudson River R. R.*²⁹⁸ very neatly illustrates this extension of the foreseeability test. In that case a collision between a train and a wagon occurred at a grade crossing through the negligence of the defendant railroad company. The driver of the wagon was stunned, the horse killed, the wagon destroyed, and the contents thereof scattered and later stolen. The court held the defendant liable for the loss of the stolen property. It would seem to go too far to say the engineer should have foreseen before the collision that thieves would steal the contents of the wagon, but foreseeability at the time defendant's tort rendered the driver helpless and the property scattered is all that is necessary.

B. Intentional.

Consequences of foreseeable intervening intentional acts are proximate.²⁹⁹

In *Katz v. Helbing*³⁰⁰ the California Supreme Court reversed a judgment sustaining a demurrer to plaintiff's complaint. Plaintiff sued for personal injuries suffered by being struck in the eye by a quantity of wet lime. The complaint alleged that for a period of five days before plaintiff's injury, defendants knew that small boys who had access to

²⁹⁸ (1918) 91 N. J. L. 190, 103 Atl. 166.

²⁹⁹ In *Sedita v. Steinberg*, *supra* note 283, defendant maintained beneath the pavement, between the building and the adjoining sidewalk, a partly filled gasoline tank, with an uncovered intake projecting above the pavement. Plaintiff, aged nine, came along with a toy pistol and fired into this intake, and exploded the gas in the tank, and caused injury to himself. The court held that if defendant was guilty of negligence and plaintiff was not, and also was not a trespasser, defendant was liable; that he was the legal cause of this damage. Here, an intermediate act of some human being, of the species questioned, would be easily foreseeable as likely to happen. In *Pearl v. Macauley* (1896) 6 App. Div. 70, 39 N. Y. Supp. 472, defendant was negligent in leaving his horse unattended and not properly tied, on the public street. The horse was caused to run by boys firing rocks at him with a sling. The running horse knocked plaintiff down, causing the injuries complained of. *Held*, that defendant was liable for plaintiff's injuries, notwithstanding the horse was caused to run by the boys firing the rocks.

In *Hines v. Garrett* (1921) 131 Va. 125, 108 S. E. 690, defendant railroad negligently carried plaintiff past her destination and those in charge of the train improperly coerced the plaintiff, an eighteen year old girl, to leave it, and return by foot at a point which bore the reputation of being a dangerous resort for tramps. While thus proceeding to her home, plaintiff was attacked and raped by several unknown persons. The court held defendant liable, as the intervening illegal act was such as a reasonable man might well have anticipated as likely to occur.

See also *St. Louis-San Francisco Ry. v. Mills* (C. C. A. 5th, 1925) 3 F. (2d) 882; *Whitehead v. Stringer* (1919) 106 Wash. 501, 180 Pac. 486.

³⁰⁰ *Supra* note 283, rehearing (1931) 66 Cal. App. Dec. 334, 1 P. (2d) 1076.

their open boxes of lime in the street were throwing the lime at passing cars and that passengers were the targets of their marksmanship. This was held a sufficient allegation of facts to show that defendants were negligent and that their acts were a proximate cause of plaintiff's injury.

Where defendant descended with his balloon into plaintiff's garden and a crowd trespassed and tramped down plaintiff's garden the court held defendant liable for the damage done by the crowd, saying he ought to have foreseen his landing would draw a crowd.³⁰¹ Defendant sold liquor to plaintiff's slave. The slave was found dead the next morning from drunkenness and exposure. The court held that defendant's act was the proximate cause of the slave's death. The court said:

"Where the mischievous purpose of a slave is manifest, or should be foreseen by ordinary prudence, the injurious act embraces the will of the slave, as one of its ingredients."³⁰²

C. Criminal.

There is no more reason why defendant should escape civil liability for consequences of an intervening criminal act which he could reasonably foresee would result if he acted as he did than for other foreseeable intervening acts. The cases usually hold him liable.³⁰³ A not uncommon type of intervening criminal act which is ordinarily foreseeable and should therefore not be treated as destroying proximity of causation is where defendant negligently leaves a door or some other opening into a shop or a store open or unlocked or in some way exposes goods to thievery.³⁰⁴

It must be observed that it is not always clear, where defendant has been guilty of negligence in leaving an opening where burglars may enter and steal and thieves do enter and steal, that defendant's negligence in any way aided the commission of the burglary. The burglars might have entered even if defendant had left no opening. Unless it appears by a preponderance of the evidence that the burglary would

³⁰¹ *Guille v. Swan* (N. Y. 1882) 19 Johns 381; *cf.* *Scholes v. The North London Ry.* (1870) 21 L. T. R. (N.S.) 835; see *Shafer v. Keeley Ice Cream Co.*, *supra* note 268; Note (1925) 38 A. L. R. 1531.

³⁰² *Harrison v. Berkley*, *supra* note 173; see *Lake Erie & Western R. R. v. McConkey*, *supra* note 287; *Lynch v. Nurdin*, *supra* note 292.

³⁰³ See notes 304-308, *infra*; *Green v. Atlanta & C. Air Line Ry.* (1924) 131 S. C. 124, 126 S. E. 441; Note (1925) 38 A. L. R. 1454.

³⁰⁴ *Filson v. Pacific Express Co.* (1911) 84 Kan. 614, 114 Pac. 863; *Brower v. New York Central & Hudson River R. R.*, *supra* note 298; *Green v. Atlanta & C. Air Line Ry.*, *supra* note 303; *Jesse French Piano & Organ Co. v. Phelps* (1907) 47 Tex. Civ. App. 385, 105 S. W. 225; *Whitehead v. Stringer*, *supra* note 299; *Marshall v. Caledonian Ry.* (1899) 1 Sess. Cas. 5th series 1060. *Contra*: *Andrews & Co. v. Kinsel* (1901) 114 Ga. 390, 40 S. E. 300; *Ragone v. State* (1924) 123 Misc. 48, 204 N. Y. Supp. 178.

not have occurred without defendant's negligent act, plaintiff fails to establish cause in fact, let alone proximate cause.³⁰⁵

In *Mitchell v. Churches*,³⁰⁶ a demurrer was overruled where the complaint stated that defendant loaned his automobile to X, knowing that X would probably drive when intoxicated, and that X did drive when intoxicated and negligently injured plaintiff.

In *Jones v. State*,³⁰⁷ where the superintendent of the state hospital for insane negligently paroled an inmate suffering from insanity and dangerous to be at large and this insane person set fire to plaintiff's building, this release was held to be the proximate cause of plaintiff's loss.³⁰⁸

In *St. Louis & S. F. R. R. v. Mills*,³⁰⁹ plaintiff's intestate was employed by defendant during a strike; defendant furnishing guards for such employees to and from their homes. While deceased and another, accompanied by a single guard, were on a street car on their way home from work, deceased was shot and killed. Threats of personal violence to employees had been reported to the chief of the guards. The court held defendant liable.

In *Green v. Atlanta & C. Air Line Ry. Co.*,³¹⁰ plaintiff alleged for a cause of action that defendant's freight yards had become, to the knowledge of defendant, very attractive to thieves who very frequently robbed cars and would shoot to kill to prevent capture. He alleged that defendant was negligent in not properly lighting and policing the yards for the protection of its employees. Plaintiff was supervising breaking up trains in the yard at night when he ran into a group of desperadoes, engaged in robbing a car, who started shooting and wounded plaintiff. The court overruled a demurrer, saying that ordinarily danger from criminal or tortious acts is not reasonably to be anticipated, but if defendant had knowledge of facts leading him reasonably to expect criminal acts to follow from his act or omission, such intervening acts would not break causation. If the intervention is reasonably to be expected it is immaterial that it is wrongful conduct.

In *Regina v. Martin*,³¹¹ defendant was indicted under a statute providing that whoever should unlawfully or maliciously inflict a wound on another should be guilty of a misdemeanor. Defendant was

³⁰⁵ *Ragone v. State*, *supra* note 304; *Strong v. Granite Furniture Co.* (Utah 1930) 294 Pac. 303.

³⁰⁶ (1922) 119 Wash. 547, 206 Pac. 6. See (1922) 36 HARV. L. REV. 110.

³⁰⁷ (1923) 122 Me. 214, 119 Atl. 577.

³⁰⁸ See (1923) 21 MICH. L. REV. 945.

³⁰⁹ *Supra* note 299.

³¹⁰ *Supra* note 303.

³¹¹ (1881) 14 Cox. C. C. 633.

one of the first persons to leave a theatre. He ran down the stairs, turned out the theatre lights and placed an iron bar across the doorway. This caused a panic. People rushed down the stairs and some were forced against the bar by the pressure of others behind and were seriously injured. The court held defendant guilty. It said what occurred was the natural and probable consequence of his act.

There is considerable authority³¹² for what is generally recognized as the unjustifiable position that consequences are not proximate where malicious and criminal acts intervene, although they are clearly foreseeable. *Vicars v. Wilcocks*³¹³ still stands as the leading authority for this view. In that case defendant told one *J. M.* that plaintiff had been guilty of unlawfully cutting the cordage of defendant. This story was repeated by *J. M.* to plaintiff's employer, who discharged plaintiff, and plaintiff afterwards applied to *R. P.* for employment and was refused it in consequence of the words and because his former master had discharged him for the offense imputed to him. Plaintiff was non-suited. The court refused to set aside the non-suit, saying that the special damage to constitute slander must be the legal consequences of the

³¹² *Watson v. Kentucky & Ind. Bridge & Ry. Co.* (1910) 137 Ky. 619, 129 S. W. 341; *Vicars v. Wilcocks* (1806) 8 East 1, 103 Eng. Re. 244; see *The Lusitania* (D. C. S. D. N. Y. 1918) 251 Fed. 715, 732.

³¹³ *Supra* note 312. The narrow view taken in *Vicars v. Wilcocks* was "sharply criticized in *Lynch v. Knights* (1861) 9 H. L. C. 577 by Lords Campbell, Cransworth and Wenslevdale and is no longer law in such cases. See note to *Vicars v. Wilcocks* in Eleventh English Edition of *Smith's Cases*." BOHLEN, *op. cit. supra* note 176, at 113, n. 74. See (1920) 30 YALE L. J. 94.

In *Bowen v. Hall* (1881) 6 Q. B. D. 333, 337, L. J. Brett said: "First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*, 1 Sm. L. C. (8th ed.) p. 264. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person: or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars v. Wilcocks*, 8 East 1, requires this doctrine for its support, it is in our opinion wrong."

Smith, in *Legal Cause in Action of Tort* (1911) 25 HARV. L. REV. 106, points out that *Vicars v. Wilcocks* is untenable. See *SELECTED ESSAYS IN THE LAW OF TORTS* (1924) 665; (1920) 30 YALE L. J. 94.

words spoken, and where the consequence was the result of the wrongful act of the master, defendant was not more answerable than if persons had seized plaintiff and thrown him into a horse pond to punish him for his supposed transgression.³¹⁴

IV. Unforeseeable Intervening Causes

In this group of cases a distinction must be taken between intervening independent and intervening dependent causes. It seems obvious that defendant should not be held liable for the consequences of independent forces whose intervention he could not foresee as likely. His own act operating alone would not have produced the injury and he had no culpable, substantial or cause in fact connection with the independent force that did directly cause the damage. If his own culpable act caused the intervening cause which in turn caused the damage the argument for his non-liability is less persuasive. If the intervening cause is an inanimate force of nature produced by defendant's act, if we choose to call this a new cause, and such force in turn causes the damage there is no ground for saying his act was not a proximate cause, for there was no spontaneity or originality in the intervening cause. If the intervening cause is the automatic, instinctive or impulsive response of an animal or a human being stimulated by defendant's act then there is little or no originality in the intervening cause, it is much like the reaction of inanimate nature and defendant cannot claim his act was not a proximate cause. Where, however, the intervening cause is the deliberate or voluntary act of a human being, power of choice and originality exists in the intervening cause, but this will vary in degree. Defendant's act may have furnished merely a possibility for the intervening human actor working his own will, or defendant's act may have only left a forced option to the intervening actor or the optional possibility may be most insignificant. It seems most in accord with the decisions to say that in general there is no liability for the consequences of unforeseeable deliberate or voluntary

³¹⁴The majority of courts hold to this old doctrine of *Vicars v. Wilcocks*, *supra* note 312, that the utterer of defamatory words is not liable to plaintiff for the damage caused by their repetition. In this connection, see *Carpenter v. Ashley* (1906) 148 Cal. 422, 83 Pac. 444. See *Mars v. President, etc., of Delaware and H. Canal Co.* (N. Y. 1889) 54 Hun. 625, 8 N. Y. Supp. 107, where defendant negligently left an engine steamed up on a side track. Some employee of defendant, acting outside the scope of his employment, apparently got into the engine and ran it across two side tracks and started it in an opposite direction. The court held that defendant was not liable for this act on the ground that there was an intervening malicious act of some independent wrongdoer, and upon the authority of Wharton, in *Negligence*, §134, refused to hold defendant a proximate cause of the injury.

intervening human acts, but to recognize several specific exceptions depending on the general principle just stated.³¹⁵

A. Independent.

As we have seen, where the chances of the intervention of an independent cause are not increased by defendant's wrongful act such act is not a proximate cause of the consequences of such intervening act although its intervention was foreseeable. But suppose the chances of intervention are increased by defendant's act; is such act a proximate cause of the consequences if defendant could not reasonably foresee its intervention?³¹⁶ In *The Mars*,³¹⁷ defendant tug collided with the Mars, punching a hole about three feet above the water line. The collision was noticeable to everybody both on the barge and on the dock. The loading of the barge continued during the day and part of the next day until the opening in her planks came below the water line so that she filled and sank. Defendant tug was held not the proximate cause of the sinking. The chances of the barge sinking were increased by defendant's wrong but the independent cause, the continued loading of the barge under the circumstances which intervened, was held not to be foreseeable.³¹⁸

In *Doss v. Big Stone Gap*,³¹⁹ plaintiff alleged that defendant had allowed the main thoroughfare leading to a city park to become so out of repair that deceased was obliged to use a detour which the town provided for those desiring to reach the park, and that while driving his car on this detour deceased was struck by an aeroplane which was using the park as a landing field. A demurrer to the declaration was sustained on the ground that the consequence was not a probable one.

*Smithwick v. Hall & Upson Co.*³²⁰ well illustrates this principle.

³¹⁵ The exceptions are discussed at pages 526-539, *infra* (Part III, Section IV, C, 4).

³¹⁶ It is only at the time of defendant's act or while he still has control that foreseeability, or probability can mean anything to defendant, and it seems fair to test proximity of causation accordingly. McLaughlin, *op. cit. supra* note 185, at 182.

See also *Smith v. Taylor-Button Co.* (1922) 179 Wis. 232, 190 N. W. 999, where defendant, in driving, cut a corner in violation of statute and as a result he collided with plaintiff's automobile. *Held*, the jury was justified in finding that the cutting of the corner was not a proximate cause of the collision, for such collision was not as a matter of law foreseeable. That foreseeability is required, see *Missouri Pacific Ry. v. Columbia* (1902) 65 Kan. 390, 69 Pac. 338; *Anderson v. Bransford* (1911) 39 Utah 256, 116 Pac. 1023.

³¹⁷ (D. C. S. D. N. Y. 1914) 9 F. (2d) 183.

³¹⁸ See *Steenbock v. Omaha Country Club* (1923) 110 Neb. 794, 195 N. W. 117. (Defendant's act was not a proximate cause although it was at least doubtful whether the intervening act was foreseeable); (1924) 37 HARV. L. REV. 391.

³¹⁹ (1926) 145 Va. 520, 134 S. E. 563.

³²⁰ (1890) 59 Conn. 261, 21 Atl. 924.

Plaintiff was a workman in defendant's service, helping to store ice in a brick building. He stood upon a platform about five feet wide and seventeen feet long, raised fifteen feet from the ground. The west side of the platform was protected by a railing. The east side was not. The forman of defendant directed plaintiff not to go upon the east side because of the danger of stepping or slipping off. Plaintiff negligently went on the east side and while there was struck by a brick falling from the wall by reason of negligence of defendant. Had plaintiff been careful and stayed on the west side he would not have been hit. The court held that plaintiff was not barred of his recovery by reason of his contributory negligence. Plaintiff's negligence did not foreseeably increase the chances of the intervention of the independent cause which produced the injury. Again, for instance, where plaintiff, a passenger on defendant's train, goes into a baggage car wrongfully and is injured while there by a collision caused by the negligence of defendant, plaintiff is not barred of recovery where it appears that his wrongfulness did not place him in a more apparently dangerous position.³²¹ If defendant negligently allows his chickens to run in the highway he is not liable to plaintiff who, riding by on a bicycle, is thrown and injured by reason of a dog frightening the chickens so that one of them flies into one of his wheels. If it was negligence toward users of the highway, still defendant might escape because he could not foresee the new independent cause which intervened to cause him damage.³²² The writer has found no cases where the chances of intervention of an independent force have been increased and proximate cause has been held to exist where the chances of intervention were not reasonably foreseeable at the time defendant acted or while the situation was still in his control.³²³

Sometimes the intervening cause is an Act of God, as a flood or a storm, and is unforeseeable, but if an ordinary rain or wind would have done the mischief the defendant does not escape liability. Thus in *Elder v. Lykens Valley Coal Co.*,³²⁴ the owner of land threw culm from his coal mine at a place where it would have been washed down

³²¹ *Webster v. Rome, Watertown & Ogdensburg R. R.* (1889) 115 N. Y. 112, 21 N. E. 725.

³²² *Hadwell v. Righton* [1907] 2 K. B. 345. But it is well to observe that the English cases do not require negligence toward plaintiff; it is sufficient if defendant is negligent in general. See *Smith v. London & Southwestern Ry.* (1870) L. R. 6 C. P. 14.

³²³ *Kansas City, Memphis & Birmingham R. R. v. Lackey* (1896) 114 Ala. 152, 21 So. 444; *Beldon v. Hooper* (1924) 115 Kan. 678, 224 Pac. 34.

³²⁴ (1893) 157 Pa. 490, 27 Atl. 545. For a similar case see *Smith v. Faxon* (1892) 156 Mass. 589, 31 N. E. 687. See pages 402-407, *supra* (Section IV of Part H) in the May issue of the REVIEW.

by an ordinary rain to the damage of plaintiff below. The court refused to excuse him although the culm was in fact washed down by an unforeseeably extraordinary flood.

It is well to observe that a situation may exist where defendant may foreseeably increase the chances of the intervention of an independent cause and nevertheless properly escape liability for the consequences. The ejection by carriers of drunken persons from their cars often presents such cases. The drunken person is usually much less secure from traffic dangers off than on defendant's cars. The cases, however, regularly relieve defendant from liability, and this is done on the ground that defendant's act of ejecting plaintiff was not a proximate cause of the injury.³²⁵ In most of these cases there is no difficulty in finding proximate cause, but what is lacking is a breach of duty to plaintiff. The question the court should have considered was, did defendant owe plaintiff a duty to permit him to remain on its cars in view of the dangers of traffic injury to him if he were ejected. Whether such duty should be found to exist should depend upon a balancing of the helpless peril of plaintiff against the burden retention of the passenger imposes upon defendant.

B. Dependent: General Rule, Proximate Cause Does Not Exist.

Where the consequences result from the intervening deliberate act of a human being they are not usually proximate if the act was not foreseeable though it was caused in fact by defendant's act. Apart from exceptions stated *infra*, Section IV, C, Part III, the general rule is that defendant is relieved of liability where the final intervening cause of the injury was unforeseeable. The cases discussed under Section IV, B, 1 and 2, Part III, where the courts refuse to hold defendant liable for either intended or probable consequences which result from an unforeseeable intervening cause, are convincing evidence of the general rule of non-liability for consequences which result from unforeseeable intervening causes. A few further illustrations are here given.

In *Victory Sparkler and Specialty Co. v. Price*,³²⁶ defendant, a manufacturer and seller of fireworks containing poisonous yellow phosphates, was held not liable for the death of a child from eating them, where such use was not reasonably to be anticipated.

³²⁵ *Lammers v. Pacific Electric Ry.* (1921) 186 Cal. 379, 199 Pac. 523; *Kee-shan v. Elgin, A. & S. Traction Co.* (1907) 229 Ill. 533, 82 N. E. 360; *O'Rourke v. Louisville & Nashville R. R.* (1915) 197 Ill. App. 45; *Railway Co. v. Valleley* (1877) 32 Ohio St. 345.

³²⁶ (1927) 146 Miss. 192, 111 So. 437, 50 A. L. R. 1462.

In *Waggoner v. Bank of Bernie*,³²⁷ defendant wrongfully dishonored plaintiff's check. The payee immediately caused plaintiff's arrest and plaintiff brought action against the bank for the injury he had suffered. The bank's wrongful dishonoring of the check was held not to be the proximate cause of the injury for the intervening deliberate act of the payee was not foreseeable.

In *Chancy v. Norfolk & W. Ry. Co.*,³²⁸ the complaint alleged that defendant railway failed to properly light its cars and that these cars were much overcrowded and, because of this lack of light and overcrowded condition, plaintiff was assaulted and robbed of all the money on his person. The court held that defendant was not liable, there being no causal connection between defendant's supposed negligent act in overcrowding and failing to light its cars and the injuries charged to have resulted therefrom. The court goes upon the theory that defendant is not bound to anticipate the act of the third person in robbing plaintiff.

In *Snyder v. Colorado Springs & C. C. D. R. R.*,³²⁹ plaintiff, a passenger on a crowded car, stood near the door with his hand resting on the door jamb. There were people between him and the door, and several on the steps. The conductor, in pushing his way through the crowd, pressed a passenger against a third person sitting in a seat on the side of the car. This man became angry, and saying that he "was getting tired of playing cushion for the electric line," raised up against plaintiff and gave a surge, by the force of which plaintiff was thrown from the car, passing over the head of the man who stood on the lower step. The carrier was held not a proximate cause of the injury to plaintiff. It could not be foreseen that a passenger would so conduct himself.

In *Garrett v. Louisville & Nashville R. R.*,³³⁰ defendant wrongfully employed plaintiff's minor son, aged nineteen, without the knowledge or consent of the parents, to work on a barge in the river. The work was not essentially dangerous, and the boy appeared to be an adult. One of the other employees, as a joke, pushed the boy into the river and he was drowned. This act could not be anticipated. Defendant's

³²⁷ (1926) 220 Mo. App. 165, 281 S. W. 130; see *Hartford v. All Night & Day Bank* (1915) 170 Cal. 538, 150 Pac. 356; *Catlin v. Union Oil Co. of Calif.* (1916) 31 Cal. App. 597, 161 Pac. 29; *Bearden v. Bank of Italy* (1922) 57 Cal. App. 377, 207 Pac. 270. *Contra*: *Mouse v. Central Savings & Trust Co.* (1929) 120 Ohio 599, 167 N. E. 868; (1930) 30 COL. L. REV. 126.

³²⁸ (1917) 174 N. C. 351, 93 S. E. 834.

³²⁹ (1906) 36 Colo. 288, 85 Pac. 686.

³³⁰ (1916) 196 Ala. 52, 71 So. 685.

wrong in hiring a minor without the consent of the parents was held not a proximate cause of the injury.³³¹

In *Central Georgia Ry. v. Price*,³³² through the negligence of defendant's conductor, plaintiff was carried beyond the point of her destination. The conductor accompanied plaintiff to an hotel at the next station where he agreed with the proprietor to pay her expenses. The hotel proprietor negligently furnished plaintiff with an inferior kerosene lamp which exploded and caused a fire. Plaintiff's hands were badly burned in an effort to extinguish the flames. The court held that plaintiff could not recover for the injuries were not the natural and proximate consequences of carrying her beyond the station, but were unusual and could not have been foreseen by defendant.

In *Malmberg v. Bartos*,³³³ defendant used an axe for chopping ice which was delivered at his store. His minor son took the axe which had been placed upon the sidewalk in front of the store and wilfully cut off plaintiff's finger. The court held that if defendant was guilty of negligence in allowing the axe to remain upon the sidewalk, such negligence was not the proximate cause of the injury, for defendant had no reason to suppose the axe would be used in this manner or that the son would be guilty of conduct so cruel and malicious.

In *Henderson v. Dade Coal Co.*,³³⁴ defendant, having custody of the state's convict, failed to keep the latter safely confined. The prisoner escaped and, while at large, raped plaintiff, who sought to hold defendant liable for resulting injuries. Defendant was held not liable, for the causal connection was broken by the unforeseeable act of the convict. Defendant may have been negligent toward persons in plaintiff's class, yet it seems clear that defendant's liability should be made to turn upon the reasonable foreseeability of an intervening act of the genus which occurred in this case.

³³¹ The cases in support of Section IV, B, are too numerous to warrant collection. For other illustrations see *Schwartz v. California Gas and Elec. Corp.* (1912) 163 Cal. 398, 125 Pac. 1044; *Davis, Director General of R. R. v. Carolina Cotton & Woolen Mills Co.* (1925) 5 F. (2d) 575; *Tobler v. Pioneer Mining & Mfg. Co.* (1910) 166 Ala. 482, 52 So. 86; *Gage v. Harvey* (1898) 66 Ark. 68, 48 S. W. 898; *Henderson v. Dade Coal Co.* (1897) 100 Ga. 568, 28 S. E. 251; *Hullinger v. Worrell* (1876) 83 Ill. 220; *Malmberg v. Bartos* (1898) 83 Ill. App. 481; *Elgin, Aurora & Southern Traction Co. v. Wilson* (1905) 217 Ill. 47, 75 N. E. 436; *Klomp v. Chicago, Milwaukee & St. Paul Ry.* (1918) 210 Ill. App. 375; *Childs v. Standard Oil Co.* (1921) 149 Minn. 166, 182 N. W. 1000; *Steenbock v. Omaha Country Club* (1923) 110 Neb. 794, 195 N. W. 117; *Harton v. Forest City Telephone Co.* (1907) 146 N. C. 429, 59 S. E. 1022; *National Bank of Commerce v. Oklahoma City* (1912) 32 Okla. 432, 122 Pac. 644; *Magnolia Petroleum Co. v. Cocke* (Tex. Civ. App. 1928) 3 S. W. (2d) 139.

³³² (1898) 106 Ga. 176, 32 S. E. 77.

³³³ *Supra* note 331.

³³⁴ *Supra* note 331.

1. Intended Consequences

Are intended consequences an exception to the rule that consequences are not proximate when an unforeseeable independent cause or unforeseeable deliberate act of a human being intervenes?

It has been said that, "It is generally agreed that results intended by an actor are proximate if they in fact take place,"³³⁵ but this is not universally true. That intended consequences are proximate where no new cause intervenes, is clear. Suppose, however, an unforeseeable unintended independent cause either in the form of an inanimate force of nature or the act of an animal or human being intervenes between the act to which liability is sought to be attached and the intended consequences without which intervening cause the consequences would not have occurred, will the original act be a proximate cause? More specifically suppose defendant inflicts a wound upon the deceased with the intention of killing her, but the wound is not dangerous and the deceased is attended by a physician who seizes the opportunity, from malice, to introduce malignant germs into the wound and she dies as a result. Is it not clear that defendant should not be held liable for her death?³³⁶

Again, suppose defendant, intending to kill *B* shoots at him in *B*'s house and misses him. *C*, a third person who sees defendant shoot, thinking that *B* is killed thereby, sneaks into *B*'s house to steal his jewelry, hoping that defendant rather than he will be suspected of the larceny. *C* on entering the house discovers *B* alive, and in order to make his escape kills *B*. Here it is clear that defendant intended to produce a certain consequence, namely the death of *B* and that very consequence in fact followed from his act, but is it not clear that defendant should not be held liable for the death of *B*?

³³⁵ McLaughlin, *op. cit. supra* note 185, at 151. Smith says in substance that the defendant is liable for intended consequences which in fact take place. Smith, *Legal Cause in Actions of Tort* (1911) 25 HARV. L. REV. 106; see SELECTED ESSAYS IN THE LAW OF TORTS (1924) 680. It is not clear that Smith is contending for anything more than that there is liability for improbable consequences if intended. Edgerton, *op. cit. supra* note 183, at 358, says, "If the defendant intended to produce the very result which he succeeded in producing, it is clear and familiar that he is a legal cause of the result, however remote and remarkable the result may be; for the reason, evidently, that this seems just. 'Any intended consequence of an act is proximate. It would plainly be absurd that a person should be allowed to act with an intention to produce a certain consequence, and then when that very consequence in fact follows his act, to escape liability for it on the plea that it was not proximate.' (Terry, Henry T., 28 HARV. L. REV. 17)."

³³⁶ In *Bush v. The Commonwealth* (1880) 78 Ky. 268, the court held defendant not guilty of deceased's death when the physician attending exposed her to scarlet fever, from which he was recovering. There was no malice on the part of the physician. See also *Parsons v. State* (1852) 21 Ala. 300, where defendant was held not guilty of murder where he had wounded the deceased, who died from negligent treatment of the wound by a physician. It is not contended that this case does not go too far. See pages 537-538, *infra* (Part III, Section IV, C, 4, d).

While there are not a sufficient number of cases to warrant the statement that it is well-established law, it seems clear from the few decisions³³⁷ which do exist that intended consequences are no exceptions to the rule that there is no liability where the injury results immediately from an unforeseeable intervening independent cause.

The intended consequences of intended intervening causes though unforeseeable, are proximate. If *A* should desire to have *B* kill *C* and in fact induces him to do so, he should not escape liability even though he did not reasonably anticipate *B* would do it. It is sufficient if the final cause of plaintiff's damage was either intended or anticipated by defendant. If *A* should give *B* poison intending him to give it to *C* and *B* should give the poison to *C*, *A* would not escape liability even though he did not, as a reasonably foreseeable consequence, anticipate *B* would poison *C*. However, if *A* neither intended nor reasonably foresaw that *B* would give the poison to *C*, *A* would not be liable if *B* gave the poison to *C*.

While defendant will not be liable for a foreseeable consequence, where an intervening independent unforeseeable and unintended cause produces it, he will not escape liability if he intended to produce, or could reasonably have foreseen that his action would produce or increase the chances of the production of the final cause of plaintiff's damage. For example, if *A* should give *B* poison intending him or another to give it to *C* and *B* or that other should give the poison to *C*, *A* would not escape liability, even though he did not reasonably anticipate *B* would poison *C*. On the other hand, if *A* should give the poison to *B* not intending him to give it to *C*, but could foresee as reasonably likely that *B* would give the poison to *C*, *A* would not escape liability. *A* may intend *B* or some other person who is in a position of access to *C* to administer the poison to *C* and if *D*, who is such other person, administers the poison, *A* should not escape liability, but *E* who picks the poison off the dust heap a year later is not such person and *A* should not be held liable if *E* administers the poison, unless defendant could reasonably have anticipated *E* or a person in his situation would have done it.³³⁸

A doctrine which might be urged as an exception to the rule that consequences are not proximate where an unforeseeable independent cause intervenes is that exemplified by the case of *Queen v. Saunders*.³³⁹ In that case, Saunders, desiring to kill his wife who lay sick in bed,

³³⁷ Not loose expressions and opinions.

³³⁸ Example taken from Beale, *op. cit. supra* note 224, at 85, which the present writer thinks was unsoundly resolved.

³³⁹ (1576) 2 Plowd. 473, 75 Eng. Re. 706.

gave her a roasted poisoned apple to eat. The wife passed the apple on to their daughter who ate it and died and Saunders was held guilty of felonious homicide. Apparently from the opinion, the court would have held defendant liable had this handing the apple to the child been an unforeseeable intervening cause, on which supposition, under the proposed statement of the prevailing rule, defendant should not be held liable for the death of the daughter. In the actual case, however, Saunders watched the daughter eat the apple which he knew was poisoned, "and did not offer to take it from her lest he should be suspected." There was therefore no unforeseeable intervening cause after the defendant lost control of the situation. The explanation of the opinion which would have held defendant even if this fact did not exist is the doctrine often called "the doctrine of transfer of intent," for which *Queen v. Saunders* is a leading case. It transfers the intent and the acts directed to the wife, to their daughter. The law deals with the case the same as if Saunders had handed the apple to the daughter directly with the intent that she should eat it and die. It is an anomalous doctrine which still persists in the law and it should not be looked upon as embodying a peculiar rule of proximate cause.³⁴⁰

2. Probable Consequences.

Are probable consequences an exception to the rule that consequences are not proximate when an unforeseeable independent cause or unreasonable deliberate human act intervenes?

It is well to keep clearly and constantly in mind the distinction between causes and consequences. Of course every cause is a consequence of some antecedent events but the consequences for which it is sought to hold a tort-feasor responsible are distinguishable from the causes thereof. It is generally stated that defendant is liable for all probable consequences,³⁴¹ but this statement does not sufficiently differentiate cause and consequence and is actually inaccurate as a statement of the law where the probable consequences result from an unforeseeable independent and sometimes dependent cause.³⁴² It is true that the law does not require foreseeability of the specific consequence or of the specific intervening cause. Some harm to the interest invaded or causes of the species or type which occurred is sufficient. It is sometimes stated that the consequence does not have to be con-

³⁴⁰ *Talmadge v. Smith* (1894) 101 Mich. 370, 59 N. W. 656; RESTATEMENT OF THE LAW OF TORTS (Am. L. Inst. 1925) §§ 10, 24, 45.

³⁴¹ Smith, who devotes the larger part of his three able articles on *Legal Cause in Actions of Tort* to the overthrow of the rule of non-liability for improbable consequences, says that the great majority of cases support liability in case the consequences were probable. SELECTED ESSAYS ON LAW OF TORTS (1924) 660.

³⁴² Pages 508-521 (Part III, Section IV, A and B).

nected with its cause by the chain of causation that was probable. Professor Terry gives this example:

"The defendant set fire on his own land in such circumstances that it was negligent, *i.e.* unreasonably dangerous, because of the probability that it would spread to the plaintiff's land. It did so spread, and damaged the plaintiff's property. The damage was held a probable consequence of the defendant's act, though the fire was communicated by sparks carried by the wind, a mode of communication that could not reasonably have been foreseen. [Citing *Higgins v. Dewey* (1871) 107 Mass. 494]"³⁴³

The example is a good one and the case undoubtedly sound but we must not draw the conclusion that it stands for the proposition that if a consequence is probable that proximate cause exists even if the consequence resulted from an improbable intervening cause. If defendant has set in operation a force which would without the intervention of another have produced the consequence the mere fact that a new and unforeseeable force intervened to accelerate the result will not prevent defendant's cause being proximate. If defendant wrongfully gives *A* a mortal wound he does not escape liability for his death because some intervening causes accelerate *A*'s death. But suppose the new intervening cause would have been necessary to bring about the consequence; should defendant's force be treated as a proximate cause if that force was wholly independent and unforeseeable? Adapt the case Professor Terry puts. Defendant sets a fire; he is negligent in so doing because it is reasonably foreseeable that it will burn across land to plaintiff's buildings and burn them down. Let us assume there is a wide road between the point where the fire is started and plaintiff's building and at only two or three places is there grass on the road where the fire could cross. It looks impossible for a fire to cross the road at any other place, but that it will cross at one of those grassy places looks probable at the time when and the place where the fire is started. Let us assume that at the trial it appears that the fire burned up to the road and died out in every place except at a point where apparently it could not possibly cross. A boy comes along, which is, let us assume, an unforeseeable occurrence under the circumstances of the case, and seeing the fire and thinking he will have some fun in seeing plaintiff's buildings burn carries the fire to the building and burns it. Will anyone for a moment argue that defendant should be held liable for the probable consequences which defendant's act actually caused? Suppose defendant negligently leaves the door of an elevator well partly ajar. It is negligent because the

³⁴³ Terry, *Proximate Consequence in the Law of Torts* (1914) 28 HARV. L. REV. 10, 19.

specific consequences of some one falling into the well is reasonably foreseeable. If someone should step or fall into the well negligently or otherwise, defendant could not escape liability on the ground that his negligence was not a proximate cause of the injury which resulted. Suppose, however, a third person should impersonate the elevator operator and invite plaintiff to step into the well and it was clear that plaintiff would not have stepped in without this invitation. In *Cole v. German Savings and Loan Society*,³⁴⁴ the court held that defendant's wrong was not a proximate cause in substantially such a case.³⁴⁵ The stepping into and falling down the shaft are foreseeable, but the impersonation and leading to the elevator, and enticement into the well, without which the injury would not have resulted, is an intervening cause which does not fall in the genus of those which were foreseeable. For that reason the case seems essentially sound.

Where defendant negligently left a cellarway open near a sidewalk and plaintiff, a small boy of eight sitting near, was kicked into it by a third person and injured, the negligence in leaving the cellarway open was held not to be a proximate cause of the boy's injury. The unforeseeable intervening act of a human being made defendant's negligence remote.³⁴⁶

Suppose a city negligently leaves an exposed excavation near a sidewalk without bannisters. It is negligent because it is foreseeable that some one will step or fall over into the excavation and be injured. Plaintiff, a city policeman, arrests *X* and on the way to police headquarters, *X* pushes plaintiff into the excavation in order to make his escape. Is the court not correct in holding that plaintiff's injuries are not the proximate consequences of the city's negligence?³⁴⁷ To be distinguished from the case of plaintiff being pushed off the sidewalk is the case where he falls off or is negligently or inadvertently jostled off.³⁴⁸ In such case the intervening but immediate cause of plaintiff's injuries is foreseeable.

Defendant negligently leaves a live wire hanging in a street and a policeman strikes it with his club and knocks it against *A*, who is

³⁴⁴ (C. C. A. 8th, 1903) 124 Fed. 113.

³⁴⁵ *Poole v. Tilford* (1921) 99 Or. 585, 195 Pac. 1114 is to be distinguished. In that case defendant negligently permitted the door to an elevator well to fail to close and lock and while plaintiff, who operated the elevator, stepped across the street, some third person got on the elevator and ran it to another floor. When plaintiff returned he opened the door and stepped into the well and was injured. Defendant was held liable on the ground that he could reasonably foresee the intervention of such independent cause.

³⁴⁶ *Miller v. Bahmuller* (1908) 108 N. Y. Supp. 924.

³⁴⁷ City's negligence held not to be a proximate cause in a similar case. *Alexander v. Town of New Castle* (1888) 115 Ind. 51, 17 N. E. 200; see *Milostan v. City of Chicago* (1909) 148 Ill. App. 540.

³⁴⁸ *Village of Carterville v. Cook* (1889) 129 Ill. 152, 22 N. E. 14.

injured. Defendant was held not to be the proximate cause of *A's* injury because the policeman's act could not be foreseen. It is clear that the harmful consequences were foreseeable³⁴⁰ and also that some one might come in contact with the wire inadvertently or negligently by his own act or the act of another and be injured thereby, and that should be enough. It is questionable if the court has not gone too far in holding the policeman's act or an act of that genus was not foreseeable.

Suppose a municipality negligently fails to perform its duty to fence a highway to prevent automobiles plunging into a ravine, and some irresponsible persons secure possession of plaintiff's automobile and push it over the edge, a thing they could not have done had the highway been properly fenced; is it not clear that defendant's negligence should not be treated as the proximate cause of the damage to plaintiff's automobile?³⁵⁰

In *Beetz v. City of Brooklyn*,³⁵¹ defendant city had permitted certain builders to use portions of the street for storing building material thereon. In this case twelve or fifteen barrels of quick lime had been placed on the sidewalk opposite the building in construction. Some of the quick lime had escaped from the barrels and spread upon the sidewalk. This was negligence toward pedestrians, who might be burned by the lime. A number of boys, including plaintiff, had gathered up this lime and were playing with it. Plaintiff, a boy of 7 years, was standing before a can containing water when one of the boys poured lime into the can. The substance coming in contact with the water, blew up into plaintiff's face and destroyed his eyes. The court held defendant not liable, saying that, assuming this act was wrongful, defendant could not in reasonable contemplation have supposed that

³⁴⁰ *Seith v. Commonwealth Elec. Co.* (1909) 241 Ill. 252, 89 N. E. 425 (statement taken from Edgerton, *op. cit. supra* note 183, at 234).

³⁵⁰ See *City of Dallas v. Maxwell* (Tex. Com. App. 1923) 248 S. W. 667 (The court held defendant city not liable where the steering gear of the automobile broke); Note (1923) 27 A. L. R. 937, 942.

In *Marton v. Jones* (1919) 44 Cal. App. 299, 186 Pac. 410, it is stated that the intervention of non-foreseeable contributing causes should not exempt defendant from liability if according to the usual experience of mankind the consequence ought to have been anticipated. In that case, defendant in violation of a city ordinance, maintained a barbed wire fence adjacent to a public sidewalk and plaintiff, while walking along the sidewalk, slipped on a pebble and fell into the fence and was injured. The court said the existence of the pebble on the sidewalk was an intervening cause. If that is true, it may be answered that an intervening cause, at least of the species which occurred, if not the specific cause which occurred, was as foreseeable as the consequence itself. It was foreseeable that pedestrians would slip on the sidewalk either through the presence of foreign substance on the sidewalk or without it, and the intervening event is of that species which occasioned the injury.

³⁵¹ (1896) 10 App. Div. 382, 41 N. Y. Supp. 1009.

the children would carry this lime from the street to the place where the injury occurred and there attempt to make use of the substance in the manner designated.

In *Franklin v. Houston Electric Company*³⁵² defendant, a city railway, was required by law to stop at certain street corners for the purpose of receiving and discharging passengers. It was provided that failure to observe the ordinance constituted negligence. While plaintiff was waiting to board defendant's car on a corner where the ordinance required defendant to stop, defendant failed to stop and the passing raised a large amount of dust. An automobile driven by an unknown third person was following defendant's street car and, due to the dust, was unable to see plaintiff and ran into plaintiff, causing injury. Defendant was held not liable. The striking of plaintiff by the automobile was an unforeseeable intervening cause between the alleged negligent act of defendant's street car conductor in failing to stop and the injury.

In *Glassey v. Worcester Consolidated Street Ry.*,³⁵³ a large wooden reel which was used for the purpose of holding feedwire was left lying within the highway limits by defendant. A number of boys removed this reel and rolled it down the street onto plaintiff's carriage. As a result, plaintiff was thrown from the carriage and received injuries. Defendant was held not liable. Assuming that leaving the reel within the highway limit was negligent because it might harm persons using the street, still that was not the proximate cause of plaintiff's injury. Defendant could not be required to anticipate such acts as those of which the boys were guilty.

In *Marsh v. Giles*,³⁵⁴ defendant placed a large rock against an electric light pole in such a position that one end rested on the ground and the other against the pole. The rock was about three feet long, six inches wide, and three inches thick and extended into the foot path by the pole. Plaintiff, a boy of seven, suggested to a young companion that they light the electric light on the pole in question by jarring the pole. Plaintiff placed his arm around the pole, his companion drew back the upper edge of the stone and let it fall on plaintiff's finger, causing the injury complained of. Defendant was held not liable. The injury was caused by the wholly unrelated and unfortunate act of plaintiff's companion. Defendant's act was wrongful because he could foresee bodily injury resulting from his leaving the stone in the foot

³⁵² (Tex. Civ. App. 1926) 286 S. W. 578.

³⁵³ (1904) 185 Mass. 315, 70 N. E. 199.

³⁵⁴ (1905) 211 Pa. 17, 60 Atl. 315.

path but he is excused from liability for the bodily injury because it was caused by an unforeseeable, intervening type of act.

In *Fuller v. Hessler*,³⁵⁵ one whose employee had burned some waste paper on a vacant lot about an hour before the accident, was held not liable for the fatal burning of a five-year-old girl whose clothing became ignited while she was warming her hands at a new fire built by boys who gathered up other waste paper lying on the lot and placed it on the embers of the first fire, there being in such case the intervention of another and independent unforeseeable human agency which broke the relation of alleged cause and effect between the negligence of defendant's employee and the injury.

In *Polloni v. Ryland*,³⁵⁶ the transmission wire of defendant car company had blown down during a storm. A stranger took it and coiled one end around a picket fence and threw the other into the grass under a tree. Without inspecting this line, defendant turned on the current, which caused the grass to fire at the point where this end of wire was located, and while attempting to put out such fire, plaintiff's intestate came into contact with the concealed wire and was electrocuted. If the wire had not been touched by a stranger, the fuse and meter in defendant's power house would have indicated a defect in the wire when the current was turned on and thus no injuries would have occurred. Defendant was held not liable, as the death was due to the intervening act of the stranger and not to defendant's failure to inspect the transmission wires, such negligence being too remote a cause to be actionable and hence not the proximate cause of the injury.

Aside from the fact that the cases so uniformly excuse defendant from liability for probable consequences caused by unforeseeable intervening acts falling in the class of cases discussed under section IV, A and B, Part III, if our contention is correct that there is no liability for intended consequences which result immediately from an unforeseeable intervening independent cause or unreasonable deliberate human act in many instances, then it follows *a fortiori* that there should be no liability for foreseeable consequences where the intervention of an unforeseeable cause has been an essential in the production of such a consequence. In the absence of intervening causes, probable consequences are proximate, but it is submitted that they are not proximate where they result immediately from an unforeseeable intervening independent cause or an intervening unreasonable deliberate act of a human being falling in the group of exceptions treated under section IV, A and B, Part III.

³⁵⁵ (1924) 226 Mich. 311, 197 N. W. 524.

³⁵⁶ (1915) 28 Cal. App. 51, 151 Pac. 296.

C. Exceptions Where Proximate Cause Exists Although the Consequences Result from Unforeseeable Intervening Causes.

1. Instinctive, Automatic, Impulsive Acts or Acts Done in Fright of an Animal or a Human Being Incited by Defendant's Act.

Where defendant provokes, stimulates or incites an animal or a human being to action which is instinctive, automatic, impulsive or from fear, he should be held liable for the consequences of such action although he could not foresee that the animal or human being would act as he did. Thus, if defendant shoots plaintiff's dog, which runs into plaintiff's house and knocks him down, defendant's act is proximate,³⁵⁷ though he could not foresee that a dog would act as this one did. This same rule applies to intervening impulsive acts of human beings. Thus defendant was held liable to plaintiff when he attacked a boy in the street with a pickax and the boy, to escape, ran into plaintiff's store and did the unforeseeable thing of knocking a faucet off a wine cask and causing the wine to run out.³⁵⁸

Where a train, belonging to defendant railroad company, was flagged by the section foreman, and the engineer negligently failed to stop, and the fireman, becoming alarmed, leaped from the train, landing on plaintiff, a section hand working on the right of way, it was held that defendant was liable for the injuries. It was clearly unforeseeable that the fireman would jump onto plaintiff, but defendant incited him to do it and it was an instinctive act done in a state of fright.³⁵⁹

Where the proprietor of a public amusement place permitted a nine year old child to slide down a long chute, negligently failing to warn the child of his use of the rubber soled shoes which he wore, and the child on becoming frightened at his great speed instinctively broke his speed with his shoes, but so suddely that he injured a leg, the proprietor was held a proximate cause of this unforeseeable injury.³⁶⁰

Defendant, apparently in play, grabbed plaintiff and whirled him around two or three times and then let him go. Plaintiff, being dizzy and unable to tell where he was going, collided with *T*, who pushed him violently away into a hook on the wall. The hook entered plaintiff's ear, causing serious injury. It was held that if the original force given to plaintiff by defendant had ceased or time was given to *T* for reflection or deliberation before he gave his push, then defendant would not be liable, was correct, and that the jury might properly find that

³⁵⁷ *Isham v. Dow* (1898) 70 Vt. 588, 41 Atl. 585.

³⁵⁸ *Vandenburgh v. Truax* (N. Y. 1847) 4 Denio 464; see *Forth Worth & D. C. Ry. v. Westrup* (Tex. Com. App. 1926) 285 S. W. 1053; *Woolley v. Scovell* (1828) 3 M. & Ry. 105, 7 L. J. (o. s.) K. B. 41; *Scott v. Shepherd* (1870) 2 W. Bla. 892, 96 Eng. Re. 525; Note (1925) 35 A. L. R. 1447.

³⁵⁹ *Jackson v. Galveston, Harrisburg & San Antonio Ry.* (1897) 90 Texas 372, 38 S. W. 745.

³⁶⁰ *Brown v. Rhoades* (1927) 126 Me. 186, 137 Atl. 58.

defendant's original force had not ceased and that *T* was but an involuntary agency impelled by the original force.³⁶¹

Acts of animals or human beings though unforeseeable if done in a state of fright excited by defendant's act do not make defendant's cause remote. Where a railway company negligently frightened cattle so that they, in a state of fright, ran away and fell into a well or impaled themselves on sharp stakes, the negligent act in frightening the cattle was held to be the proximate cause of the injury.³⁶²

A railway company which negligently causes a driver of an automobile, in a state of excitement, to swing away from the track to avoid being hit is a proximate cause of the injuries to plaintiff, a passenger in the automobile.³⁶³ Defendant, who wrongfully attempts to beat plaintiff's slave, is liable for the injuries the slave receives in breaking his leg in attempting to escape defendant's blows.³⁶⁴ Defendant was held liable for injuries received by plaintiff who was caught in a rush of a theater audience resulting from a panic at the escape of some tamed lions.³⁶⁵ Where a wife, in order to escape from the violence of her husband, who had threatened her life, got out of a window and fell to the ground and broke her leg, the husband's act was held the proximate cause of her injury.³⁶⁶

In *Gipe v. State*,³⁶⁷ an indictment charged defendant with killing Mollie Starbuck and her child by striking them and throwing them in a well. Defendant was found guilty of manslaughter. There was evidence that the house of Mollie Starbuck had been broken into and that some time afterwards, she was found with her child in a shallow well in the rear of the house. She was in a frenzied state and suffering from shock and exhaustion. She died as a result. The trial court charged that if defendant broke into her house to commit burglary and frightened her to such an extent that she lost her reason and went and jumped in the well with her child and died by reason of her exposure and fright, defendant would be guilty of murder in the first degree.

³⁶¹ Ricker v. Freeman (1870) 50 N. H. 420.

³⁶² In *Sneesby v. Lancashire & Yorkshire Ry.* (1875) L. R. 1 Q. B. D. 42, the court held that defendant's act in scaring the cattle was the proximate cause where the cattle were struck by another train. The striking of the cattle by another train was a new independent act which would make defendant's act remote if the intervening act could not have been foreseen.

³⁶³ Griffin v. Hustis (1919) 234 Mass. 95, 125 N. E. 387; see *Twomley v. Central Park North & East River R. R.* (1877) 69 N. Y. 158.

³⁶⁴ Johnson v. Perry (1841) 21 Tenn. (2 Hump.) 569.

³⁶⁵ Stamp v. Eighty-Sixth Street Amusement Co. (1916) 95 Misc. 599, 159 N. Y. Supp. 683.

³⁶⁶ Rex v. Halliday (1890) 61 L. T. R. 701, 38 W. R. 256.

³⁶⁷ (1905) 165 Ind. 433, 75 N. E. 881.

This was held error. Since the indictment charged the killing to be by physical force, no other means of causing the death should have been considered by the jury. Apparently the court would treat the consequence, though resulting from fright, as proximate.

An important distinction must be observed in the cases of intervening animal and human acts caused by defendant's acts where they are unforeseeable. The intervening unforeseeable act of the animal or human being, if the consequence is to be proximate, must not only be caused in fact by defendant's act, but it must have been instinctive, automatic or impulsive and have actually been incited by defendant's act.

If defendant, in working near a highway where horses pass, leaves some machine or other article exposed and plaintiff's horses are frightened at it and run away, defendant will not be held liable if he could not foresee that horses would scare at it. He did not incite or stimulate the action of the horses, although he did in fact cause the fright.³⁶⁸

Suppose a city has a municipal park where it keeps a flock of sheep which are ordinarily penned up during the hours of traffic. An employee negligently releases the sheep during traffic hours and drives them away from the travelled highways in the park. Dogs are excluded from the park except when they are led on leash by an adult. A lady who came into the park with her dog on a leash, when passing the flock of sheep, released the dog, which chased the sheep onto a driveway in front of plaintiff's automobile, causing him to wreck it and to injure himself. Defendant's wrong in leaving the sheep in the park was a cause in fact of the dog's chasing them, but he did not incite the dog to his act. If it was not foreseeable in the particular case that dogs would chase the sheep, defendant's act should not be treated as the proximate cause of plaintiff's injury.³⁶⁹

Defendant failed to maintain a fence sufficient to keep his horse off the highway and in a cloud of dust the plaintiff ran into the horse and wrecked his automobile. The animal has taken advantage of the inaction of defendant, but was not provoked to action by him. Defendant's

³⁶⁸ Note (1897) 38 L. R. A. 236. Defendant is liable for the consequences of the frightened horse in such case only if he could reasonably foresee that horses might take fright.

³⁶⁹ In *City of Waco v. Branch* (Tex. Civ. App. 1928) 8 S. W. (2d) 271, the court held that defendant, had he not waived the privilege by the way in which he allowed this issue to be submitted, would have been entitled to have submitted to the jury the question whether the injury was caused by a dog frightening the sheep across the highway and whether such intervening act of the dog was foreseeable.

wrong is not a proximate cause of the injury if the acts of the animal in getting into the highway were not foreseeable.³⁷⁰

By this test it would seem that a wrong result was reached in *Rosan v. Big Muddy Coal & Iron Co.*³⁷¹ Defendant failed to ventilate the shaft of his mine as provided by statute. Plaintiff, while driving a mule into the shaft, was injured because of the mule's bucking and backing, due to the foulness of the air. Plaintiff's light at the same time went out from the same cause, and he fell off the car and was injured by the mule. The court held that plaintiff had no right of action, because the injuries sustained were not the ordinary and natural result of imperfect ventilation. The court said:

"The only damages that may be recovered in an action for negligence are such as are the natural and reasonably to be expected result of the defendant's acts, and the consequences must be such as, in the ordinary course of things, would flow from the acts and could be reasonably anticipated as a result."³⁷²

Apparently the mule's action was instinctive and was provoked, not merely caused, by defendant's act. Defendant should have been held liable although the act of the mule was not foreseeable.³⁷³

2. Delirious Acts

Unforeseeable acts done in a state of delirium for which defendant is responsible do not prevent the consequences from being proximate. If, for instance, during the time plaintiff is in bed recovering from his broken leg, the leg is re-broken while plaintiff is in a delirium of suffering³⁷⁴ from colic³⁷⁵ and vomiting incident to his injury, the intervening cause being an automatic one, no matter whether foreseeable or not, does not make defendant's original wrong remote. Where a railroad company took charge of an employee afflicted with smallpox and hired a person to guard and nurse him and while the patient was delirious

³⁷⁰ *Fox v. Koehnig* (1926) 190 Wis. 528, 209 N. W. 708. The court set aside a verdict finding the defendant was the proximate cause of the injury to the plaintiff's automobile.

³⁷¹ (1906) 128 Ill. App. 128.

³⁷² *Ibid.* at 128.

³⁷³ The distinction between caused in fact acts not provoked and those provoked is difficult to make. Careful consideration of the cases seems to require the distinction to be made. Beale says, "Though there is an active force intervening after the defendant's act, the result will nevertheless be proximate if the defendant's act actively caused the intervening force; in such case, the defendant's force is really continuing in active operation, by means of the force it stimulates into activity." *SELECTED ESSAYS IN THE LAW OF TORTS* (1924) 743. It seems clear that Beale did not mean to include all intervening forces caused in fact, though Professor Edgerton so assumes. Edgerton, *op. cit. supra* note 183, at 223.

³⁷⁴ *Farnon v. Silver King Coalition Mines Co.* (1917) 50 Utah 295, 167 Pac. 675.

³⁷⁵ *Postal Telegraph Cable Co. v. Hulsey* (1901) 132 Ala. 444, 31 So. 527.

with fever, the nurse fell asleep and the patient escaped and wandered onto plaintiff's premises and communicated the disease to a child, the court held defendant railroad company liable.³⁷⁶

a. Suicide Cases

Suicide may be an independent or dependent, a foreseeable or unforeseeable, an automatic or deliberate act. It seems best to briefly treat these cases separately.

These present intrinsic difficulties of fact rather than of law. In the first place it may be difficult to determine whether defendant's wrongful act was a cause in fact of the act of suicide.³⁷⁷ Of course if the suicide was caused in fact by defendant's act and was reasonably foreseeable there is no difficulty in finding proximate cause. If the suicide was not foreseeable³⁷⁸ then it would seem there should be no liability if it was a conscious, free, deliberate act,³⁷⁹ but this is a most difficult question of fact to determine in such cases. On the other hand, if it was an automatic act, one resulting from physiological processes over which the victim had no control, defendant's act should be treated as the proximate cause.³⁸⁰

3. Compelled Action.

Where defendant's wrong obliges persons to take or refrain from action which directly produces injuries it would seem too clear for argument that defendant's wrong should be treated as a substantial factor or proximate cause.

Where, while plaintiff is undergoing an operation in the hospital, the lights are turned off by the negligence of defendant and the surgeons are compelled to sew up plaintiff without finishing the operation, it would seem clear that defendant's wrong, though it produced unfore-

³⁷⁶ *Missouri, K. & T. Ry. of Texas v. Wood* (Tex. Civ. App. 1902) 68 S. W. 802.

³⁷⁷ *Withers v. London, Brighton & South Coast Ry.* [1916] 2 K. B. 772.

³⁷⁸ *Scheffer v. R. R.* (1881) 105 U. S. 249.

³⁷⁹ *Salsedo v. Palmer* (C. C. A. 2d, 1921) 278 Fed. 92; *Daniels v. New York, New Haven & Hartford R. R.* (1903) 183 Mass. 393, 67 N. E. 424; see Note (1923) 23 A. L. R. 1271.

³⁸⁰ *Sponatski's Case* (1915) 220 Mass. 526, 108 N. E. 466; see *Long v. Omaha & Council Bluffs Street Ry.* (1922) 108 Neb. 342, 187 N. W. 930; *Marriott v. Maltby Main Colliery Co.* (1920) 90 L. J. K. B. 349, [1920] 37 T. L. R. 123.

In *Waas v. Ashland Day & Night Bank* (1923) 201 Ky. 469, 257 S. W. 29, defendant's employee threatened plaintiff with criminal prosecution with the intent to intimidate, terrify and frighten him. After plaintiff left the bank he suffered great physical pain and mental anguish and got a gun and shot himself in an attempt to take his own life. The court held defendant was not liable for the injuries plaintiff inflicted on himself through the result of aberrations on the ground that defendant's acts were not the proximate cause of plaintiff's injury, since it was unforeseeable that he would do as he did.

seeable intervening action, should be treated as a proximate cause of the consequences of such action.³⁸¹ The majority of decisions hold a telephone or telegraph company liable when its negligence in giving prompt service prevents forthcoming medical aid which would have alleviated suffering or necessitates inadequate medical service when adequate service would have been forthcoming and would have prevented the damage for which plaintiff seeks recovery.³⁸²

In *Hodges v. Virginia-Carolina Ry.*,³⁸³ a railroad company which cut the line of a public telephone company and prevented complainant reaching a doctor whom he had engaged to wait on his wife during child birth, by reason of which failure the wife died, was held liable for the death.³⁸⁴

4. Deliberate or Voluntary Acts

a. To Avert Threatened Harm

Where a person is injured in making a normal and reasonable attempt to avert harm from himself or another threatened by defendant's wrong or to escape from a perilous situation in which such wrong has placed him, such attempt does not prevent defendant's act from being the proximate cause of the injury.³⁸⁵ Where a railroad company negligently started a prairie fire, which spread to the land of a nearby property owner, the company was held liable for the injuries the property owner's wife received in attempting to put out the fire.³⁸⁶

Defendant company frightened plaintiff's horse and the driver, acting reasonably in order to save himself, abandoned the horses and jumped and the horses ran away and one of them was injured. Defendant's act was held to be a proximate cause of the injury.³⁸⁷

Where plaintiff alleged damages to be the result of defendant's negligence in not properly maintaining a road, in that the rails were

³⁸¹ See (1930) 14 MINN. L. REV. 699. *Contra*: Georgia Power & Light Co. v. Haskins (1930) 40 Ga. App. 822, 151 S. E. 668, *semble*.

³⁸² Western Union Tel. Co. v. Morris (C. C. A. 8th, 1897) 83 Fed. 992; Carter v. Telegraph Co. (1906) 141 N. C. 374, 54 S. E. 274; Western Union Tel. Co. v. Cooper (1888) 71 Tex. 507, 9 S. W. 598.

³⁸³ (1920) 179 N. C. 566, 103 S. E. 145.

³⁸⁴ See Note (1921) 10 A. L. R. 1456.

³⁸⁵ Maryland Steel Co. of Sparrows Point v. Marney (1898) 88 Md. 482, 42 Atl. 60; Fahy v. Director General of Railroads (1920) 235 Mass. 510, 126 N. E. 784; Collins v. West Jersey Express Co. (1905) 72 N. J. L. 231, 62 Atl. 675; Bennett v. Lockwood & Carter (N. Y. 1838) 20 Wend. 223, 32 Am. Dec. 532; Twomley v. Central Park North & East River R. R., *supra* note 363; Vallo v. United States Express Co. (1892) 147 Pa. 404, 23 Atl. 594; Boggs v. Jewell Tea Co. (1919) 263 Pa. 413, 106 Atl. 781; Morris v. State (1895) 35 Tex. Crim. Rep. 313, 33 S. W. 539; Jones v. Boyce (1816) 1 Stark. 493, 171 Eng. Re. 540; Collins v. Middle Level Commissioners (1869) L. R. 4 C. P. 279; see Note (1925) 35 A. L. R. 1447.

³⁸⁶ Wilson v. Northern Pacific Ry. (1915) 30 N. D. 456, 153 N. W. 429.

³⁸⁷ Quigley v. The Delaware & Hudson Canal Co., *supra* note 282.

seven inches above the cross ties, and the road bed was below the ties and loose and as a result, plaintiff's car got stuck on the crossing and plaintiff, knowing that a train was about due, in working frantically to get his car off the track, sustained bruises of a temporary nature, and hernia of a permanent and serious nature as well as nervous shock, it was held that plaintiff's declaration was not demurrable.³⁸⁸

In order that unforeseeable intervening deliberate acts of human beings done to avert harm shall not make the defendant's wrong a remote cause, the intervening actor must act without rashness or imprudence.³⁸⁹ For example, where defendant negligently allowed his steers to escape onto the public highway, endangering persons using the same, and a policeman, in shooting at a steer, hit plaintiff, it was held that defendant's negligence was not a proximate cause of plaintiff's injury³⁹⁰ but this should not be so unless the policeman did not act reasonably in attempting to protect people on the highway.

Where plaintiff was a passenger on defendant's stagecoach and, in alarm, jumped, breaking his leg, when the driver of the coach stopped off the road with one side eighteen inches above the other, the court said plaintiff could recover if his jump was due to the fact that he believed reasonably that it was necessary to save himself.³⁹¹ But when plaintiff, in a state of peril, acts through fear, reasonable action is usually not required.³⁹²

b. To Extricate the Actor from a Situation Which Threatens Harm (Not Necessarily Perilous) Thrust Upon Him by Defendant's Act.

Defendant's wrongful act in placing a person in a situation, though it may not be perilous, from which he must be extricated by himself or another person to avoid harm to himself is the proximate cause of injuries received by such person or another in reasonable efforts to relieve him. Where defendant wrongfully obstructs a sidewalk, requiring a pedestrian to go into the street, defendant is a proximate cause of injury received by the pedestrian in the street while he is acting reasonably.³⁹³ Thus where plaintiff, an upper tenant in a build-

³⁸⁸ *Atlantic Coast Line R. R. v. Wildman* (1923) 29 Ga. App. 745, 116 S. E. 858, *aff'd.*, 157 Ga. 42, 120 S. E. 545.

³⁸⁹ *United States v. Warner* (C. C. 7th, 1848) 4 McLean 463; *State v. Preslar*, *supra* note 224.

³⁹⁰ *Von Wangenheim v. New York Stock Yards Co.* (1915) 153 N. Y. Supp. 696.

³⁹¹ *Jones v. Boyce*, *supra* note 385; see *Stokes v. Saltonstall* (1839) 38 U. S. (13 Pet.) 181; *Fahy v. Director General of Railroads*, *supra* note 385.

³⁹² *Sieb v. Central Pennsylvania Traction Co.* (1911) 47 Pa. Sup. Ct. 228; see cases cited in note 385, *supra*. But see *Hendrickson v. Commonwealth* (1887) 85 Ky. 281, 3 S. W. 166.

³⁹³ *Shafir v. Sieben* (Mo. 1921) 233 S. W. 419; see *Notes* (1922) 16 A. L. R. 1054; (1922) 17 *ibid.* 646.

ing, was injured during a fire while escaping through a window by reason of his inability to get down a stairway negligently obstructed by defendant, the court held that defendant's act was the proximate cause of the injury.³⁹⁴ Where a railroad company puts a passenger off at the wrong station and the passenger, in reasonable and appropriate efforts to reach the station or his destination, stumbles and is injured³⁹⁵ or is worn out and suffers a miscarriage,³⁹⁶ or where the passenger suffers from inclement weather to which defendant's wrongful act has exposed him,³⁹⁷ the company is held liable. A city was held liable where it negligently permitted a ditch to form in a street, into which plaintiff drove on a rainy night, breaking the axle of his carriage and causing him to be dragged over the dashboard. He procured another carriage, to which he hitched his horses, and drove several miles to his home. During this time he was exposed to the cold and rain, which exposure greatly aggravated his injuries. It was held that the result of the exposure was the proximate result of the defect in the street, the court saying:

"The plaintiff . . . had the option to stand in the street where the accident had placed him, or to go home, exercising reasonable prudence, and the best judgment he had. There is thus such a direct connection between the accident and the exposure as to make the defendant liable for the latter."³⁹⁸

Defendant, the owner and operator of a hotel building abutting on the street, had the windows of the hotel equipped with ropes and placards directing their use in case of fire, but the screens were securely nailed to the windows and there was no exit possible through the windows except by knocking out the screens, and if knocked out, there was nothing to prevent the screens from falling to the sidewalk below. The court held that the act of the guest in knocking out a screen was not an intervening cause that broke the chain of causation between the negligence of the owner in so arranging the screens and the injury to a pedestrian upon the sidewalk.³⁹⁹

A steamer was held liable where a collision took place between the steamer and a barque, the steamer being alone to blame. The steer-

³⁹⁴ Cohn v. May (1905) 210 Pa. 615, 60 Atl. 301.

³⁹⁵ Reinard v. Bloomsburg & Sullivan R. R. (1910) 228 Pa. 384, 77 Atl. 560.

³⁹⁶ Brown & Wife v. Chicago, Milwaukee & St. Paul Ry. (1882) 54 Wis. 342, 11 N. W. 356.

³⁹⁷ Schunaker v. St. Paul & Duluth R. R. (1891) 46 Minn. 39, 48 N. W. 559; Yazoo & M. V. R. R. v. Hardie (1914) 106 Miss. 436, 64 So. 1; St. Louis Southwestern Ry. v. Ricketts (1902) 96 Tex. 68, 70 S. W. 315.

³⁹⁸ Ehgott v. The Mayor of New York (1884) 96 N. Y. 264, 282.

³⁹⁹ Crow v. Colson & Wolcott (1927) 123 Kan. 702, 256 Pac. 971; see Notes (1924) 29 A. L. R. 77; (1928) 53 *ibid.* 462.

ing compass, chart, log, and log-blast of the barque were lost through the collision. The captain of the barque made for a port of safety, navigating the ship by a compass which he found on board. The barque, while on her way, without any negligence on the part of the captain or crew, and owing to the loss of the requisites for navigation above-mentioned, grounded and was abandoned. *Held*, that the grounding of the barque was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damages caused thereby.⁴⁰⁰

Where plaintiff's wife, far advanced in pregnancy and suffering from heart disease, had been confined to her bed for a month and plaintiff, at the termination of his lease, had been given notice to leave and, on plaintiff's explaining it would be impossible to move right away, defendant nevertheless began to tear down the house and make a noise and dust which made plaintiff's wife so violently ill that he was obliged to remove her to a hospital where she died three days later, the court held that defendant's acts were the proximate cause of her death.⁴⁰¹

Where the negligent acts of defendant in erecting a culvert which created a condition threatening harm to third persons and they intervened and tore down an obstruction built by plaintiff to protect himself from the consequences of defendants' act, defendants were held liable.⁴⁰²

Where defendant's driver negligently left its horse untied and it strayed onto a station platform and endangered passengers and there

⁴⁰⁰ *The City of Lincoln* (1889) L. R. 15 Prob. Div. 15.

In *Lewis v. Flint & Pere Marquette Ry.* (1884) 54 Mich. 55, 19 N. W. 744, plaintiff was negligently carried beyond his station and let off. He was told that he was but about two car lengths beyond the station. In fact, he was much further. He was compelled to re-trace his steps in the dark, and in so doing, fell into an open cattle guard when his foot slipped, and was greatly injured. The court, in holding that defendant's act was not the cause of plaintiff's injury said, "The defendant or its agents had not produced the deception or caused the foot to slip; and such wrong as the defendant had been guilty of was in no manner connected with or related to the injury except as it was the occasion for bringing the plaintiff where the accident occurred. It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle guard, the connection of defendant's wrong with the injury would have been precisely the same which appears here." 54 Mich. at 65, 19 N. W. at 749. The court fails to distinguish between intervening independent causes and those which defendant sets in motion by its own wrong.

⁴⁰¹ *Preiser v. Wielandt* (1900) 48 App. Div. 569, 62 N. Y. Supp. 890.

⁴⁰² *Collins v. The Middle Level Commissioners*, *supra* note 385.

fell down and the station master, in a reasonable effort to raise the horse, strained himself, from the effects of which he died, the court held this unforeseeable intervening act did not prevent defendant's wrong being the proximate cause of the station master's death.

Defendant is not liable, however, for the results of unreasonable, rash or imprudent conduct on the part of the passenger or another, to relieve himself or another from a situation in which defendant's wrong has placed him or the other. Where defendant told plaintiff that defendant's train made connections at *X* with a train to plaintiff's destination, plaintiff found, on reaching *X* that there was no connection. Plaintiff walked three or four hundred yards to a store where she found accommodations. After waiting four hours, in great anxiety, she succeeded in hiring a team and set out for her father's house. It was raining at the time, but the driver of the team would not let it wait, and as it was getting late, she thought it best to start. The road was rough, and she was greatly jolted. Several showers occurred during the drive, and she was wet through and her baggage damaged. She suffered abdominal pains and hemorrhage, and within a month, a miscarriage, and then after that, subsequent miscarriage. The court held that defendant was not the proximate cause of damage she suffered from the drive.⁴⁰³

In *Atchison, Topeka & Santa Fe Ry. v. Calhoun*,⁴⁰⁴ *C* and her son, the plaintiff, a boy about three years of age, were passengers on a train of defendant railroad. Their destination was Edmond. The train, somewhat late, arrived at Edmond about 7:30 o'clock in the evening. *C* had never travelled the route before. The station was not called out by any of the trainmen nor was she told by any one of them that it was Edmond. In answer to a question, she was informed by other passengers that the train had arrived at Edmond, and she hastened to alight, leading the boy with her. When she reached the platform of the car the train had started, after, as the jury found, a stop of one minute, and she handed the boy to *R*, another passenger on the train who had left it momentarily, intending to return and resume his journey. *R* was then standing upon the station platform. He took the child, handed him to his son whom he had met at the station, returned to the steps of the car and told *C* not to jump off as the car was running too rapidly. The station platform was dimly lighted and no employee of defendant rendered *C* or her son any assistance in leaving the train, nor gave them any warning. Plaintiff was landed on the platform without injury. One *J* then came along, took up the child in

⁴⁰³ *Folkes v. Southern R. Co.* (1899) 96 Va. (6 Burks) 742, 32 S. E. 464.

⁴⁰⁴ (1909) 213 U. S. 1, 29 Sup. Ct. 32.

his arms, ran along by the car which was moving all the time with increasing rapidity, and attempted without success to return the child to its mother, who was standing on the platform of the car. *J* ran 75 to 100 feet to the end of the wooden station platform, and then stumbled over a baggage truck which had been used in unloading the baggage from the train and had been left at the very end of the platform and partly on it, within a few feet of the rails. When *J* stumbled, he lost his hold on the child who fell under the cars and was injured. *Held*, that although defendant may have been originally in fault, the railroad company was not liable for the negligence of one who, in a reckless effort to run after and board a rapidly moving train, stumbled on a truck which had been left by an employee at a place where ordinarily no passengers got on or off the cars.

Where plaintiff, a passenger, by reason of being misinformed as to the time of the departure of his train, missed the train and in consequence thereof procured an automobile and drove across the country during a cold, stormy night, equipped with inadequate clothing, the court held that he could not recover for the discomfort and inconvenience suffered, as the carrier was not the proximate cause of such damage.⁴⁰⁵

The failure of a logging company to run a train to the camp on the day of its closing, to take out the employees, is not the proximate cause of an injury to the employee by freezing in attempting to walk out, where the camp afforded him food, shelter, and warmth.⁴⁰⁶

*Tisdale v. The Inhabitants of Norton*⁴⁰⁷ seems wrong on principle and questionable on authority. By a Massachusetts statute, the towns were required to keep up the highways and were made liable for any damages which resulted from defects in the highways. Plaintiff, in order to avoid impassable defects in the highway, turned off the highway and sustained the injuries complained of in a field which he was passing through. He now sues the town for the injuries. *Held*, the

⁴⁰⁵ *Weeks v. Great Northern Ry.* (1919) 43 N. D. 426, 175 N. W. 726; see *Indianapolis, Bloomington & Western Ry. v. Birney* (1874) 71 Ill. 391. But see *Louisville, New Orleans & Texas R. R. v. Mask* (1887) 64 Miss. 738, 2 So. 360.

In *Newcomb v. New York Central and Hudson River R. R.* (1904) 182 Mo. 687, 81 S. W. 1069, the train porter told plaintiff to jump off and defendant was held liable. For other cases, see *International & Great Northern R. R. v. Addison* (1906) 100 Tex. 241, 97 S. W. 1037; *Le Beau v. Minneapolis, St. Paul & Sault Ste. Marie R. R.* (1916) 164 Wis. 30, 159 N. W. 577; *Lemos v. Madden* (1921) 28 Wyo. 1, 200 Pac. 791.

⁴⁰⁶ *Brady v. Oregon Lumber Co.* (1926) 117 Or. 188, 243 Pac. 96, 45 A. L. R. 812.

⁴⁰⁷ (Mass. 1844) 8 Metc. 388.

injuries were not the proximate result of the town's failure to keep up the highway. The court said:

"Now, as it seems to us, in case one voluntarily leaves the highway, because it has become dangerous or impassable by reason of want of repair, and enters upon other land, without the limits of the highway, he has no right to recur to the town for remuneration for any injury occurring to him on the new passage way of his own selection."⁴⁰⁸

Suppose defendant's act produces a condition or situation from which plaintiff reasonably and justifiably seeks to relieve himself and injury results while he is so doing, not from the condition alone which defendant was responsible for, but from that condition combined with an unrelated independent cause which was not foreseeable and but for which no injury would have resulted. Should defendant be held liable? *Bruggeman v. City of York*⁴⁰⁹ possibly presents such a case. Defendant city raised a grade of a lot, causing water and mud to overflow the streets and make a foul odor and large pools of filth, sometimes covering parts of adjoining lots and especially plaintiff's lot. Plaintiff took a broom and went out to clean some of the filth so deposited in the alley in front of her home, and in an effort to remove a coil of wire which had become lodged in the pavement or gutter, she pushed it with the broom so that it sprang back, and in so doing sent splash of the thick mud into her face and left eye thereby causing, as the jury found, the loss of the sight thereof. There was nothing to indicate that

⁴⁰⁸ *Ibid.* at 392; see *Enochs v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry.* (1896) 145 Ind. 635, 44 N. E. 658; *Jones v. City of Fort Dodge* (1919) 185 Iowa 600, 171 N. W. 16; *De La Pena v. International & Great Northern Ry.* (1903) 32 Tex. Civ. App. 241, 74 S. W. 58. *Contra*: *Central of Georgia Ry. v. Owen* (1904) 121 Ga. 220, 48 S. E. 916; *Southern Ry. v. Floyd* (1911) 99 Miss. 519, 55 So. 287; *Daneschocky v. Sieble*, *supra* note 287; *Shafir v. Sieben*, *supra* note 393.

In *Cavanaugh v. Centerville Block Coal Co.* (1906) 131 Iowa 700, 109 N. W. 303, defendant furnished a railroad track, and cars leading to the room in which plaintiff worked. Plaintiff, however, was required to lay the track in the room, and push the cars, loaded with coal, to the entry. One of the cars became derailed where the room track connected with the entry track, because of defect in the track, due to the negligence of defendant. Plaintiff, with the assistance of the pit boss, was attempting to re-rail the car, when plaintiff's fingers were caught and pinched. *Held*, that the derailment of the car was not the proximate cause of plaintiff's injury. The court said the proximate result of the defect in the track had been completely reached when the car became derailed. The condition immediately attending or preceding the injury was the derailed car. The defect of the track was therefore nothing more than the cause of the condition. "There was no emergency and no necessary connection between the result of the defective track and the means to be employed for remedying the condition which had arisen by reason of such defect." The court said: ". . . it is not proper to require that the intervening cause to be searched for be one involving negligence or wrong. When an adequate intervening cause is found, it is immaterial whether that cause is one involving liability." 131 Iowa at 707, 109 N. W. at 306.

⁴⁰⁹ (1917) 259 Pa. 94, 102 Atl. 415.

defendant was in any manner responsible for the presence of the wire in the street. Defendant was held not liable, the court saying:

"Here . . . the coiled wire which threw the mud in plaintiff's face, as she pushed it with her broom, was the immediate, unrelated and intervening cause of the accident."⁴¹⁰

If the court is correct in treating the coil as an intervening cause, the result accords with the general rule that consequences are not proximate which result immediately from an unforeseeable independent intervening cause.

c. To Rescue Property or Persons.

Defendant may be liable for consequences which follow from the intervention of deliberate acts of human beings where those acts are done in rescuing property put in jeopardy by defendant's wrongful act.⁴¹¹ This result is reached even where the intervening acts were not foreseeable if they are reasonable and proper acts.⁴¹² Thus in *Oliver & Wife v. Town of La Valle*,⁴¹³ where plaintiff's brother could not extricate a horse which had broken through a bridge, plaintiff in her exertions to get help suffered a miscarriage for which defendant was held liable.

Where defendant negligently starts or permits a fire to escape, he is liable for injuries resulting from reasonable efforts to prevent its spread to other property.⁴¹⁴ Thus where defendant encamped in a vacant house on an open prairie is threatened with the destruction of his property and sets a back fire to prevent the destruction, he is not liable for the destruction of plaintiff's property from the back fire, but

⁴¹⁰ *Ibid.* at 97, 102 Atl. at 415.

⁴¹¹ *Henry v. Cleveland, C., C. & S. D. L. R. R. R. Etc. R. R.* (C. C. S. D. Ill. 1895) 67 Fed. 426; *Illinois Central R. R. v. Siler* (1907) 229 Ill. 390, 82 N. E. 362; *Liming v. Illinois Central R. R.* (1890) 81 Iowa 246, 47 N. W. 66; *Glang v. Chicago, Milwaukee, St. Paul Ry.* (1903) 119 Iowa 611, 93 N. W. 575; *Page v. Bucksport* (1874) 64 Me. 51; *Donnelly v. Piercy Contracting Co.* (1918) 222 N. Y. 210, 118 N. E. 605; *Cooper v. Richland County* (1906) 76 S. C. 202, 56 S. E. 958; *Stickney v. Town of Maidstone* (1858) 30 Vt. 738; see *Notes* (1929) 61 A. L. R. 1028; (1929) 64 *ibid.* 521, 526. *Contra*: *Crowley v. City of West End* (1907) 149 Ala. 613, 43 So. 359; *Clifford v. Metropolitan Life Ins. Co.* (1923) 197 Ky. 828, 248 S. W. 180; *Cook v. Johnston* (1885) 58 Mich. 437, 25 N. W. 388; *Note* (1924) 32 A. L. R. 921.

⁴¹² *Hutton v. Link Oil Co.* (1921) 108 Kan. 197, 194 Pac. 925; *Rexter v. Starin* (1878) 73 N. Y. 601; *Wasmer v. The Delaware, Lackawanna & Western R. R.* (1880) 80 N. Y. 212; *Lowery v. The Manhattan Ry.* (1885) 99 N. Y. 158, 1 N. E. 608; *Woodcock v. Hallock* (1924) 98 Vt. 284, 127 Atl. 380; *Prescott v. Connell* (1894) 22 Can. Sup. Ct. 147.

⁴¹³ (1875) 36 Wis. 592.

⁴¹⁴ *Illinois Central R. R. v. Siler*, *supra* note 411 (plaintiff injured in saving his own property); *Berg v. Great Northern Ry.* (1897) 70 Minn. 272, 73 N. W. 648.

the author of the original fire is.⁴¹⁵ This rule applies where plaintiff seeks to save his neighbor's property⁴¹⁶ or even is a stranger gratuitously volunteering his services.⁴¹⁷

The efforts must be reasonable and not rash. Thus a servant was not allowed to recover where, in fighting a fire, he was repeatedly warned not to get too hot and to allow others to relieve him,⁴¹⁸ or a servant who was rash in running into a burning building to a telephone which was enveloped in flames to give the fire alarm.⁴¹⁹ Perhaps *Pike v. Grand Trunk Ry. of Canada*⁴²⁰ went too far in relieving defendant of liability where plaintiff's intestate, a woman seventy-two years old, did the admittedly praiseworthy act of going fifty rods to put out a fire negligently set by defendant, on the ground that her act was voluntary and the peril not imminent.

Some courts, adhering to the rule of non-liability for improbable consequences refuse to hold defendant liable in such cases.⁴²¹ Of course plaintiff will be barred by his own contributory negligence.⁴²²

Where the life of a person is imperiled by the wrongful act of defendant, a person who is injured while seeking to rescue such person is not precluded from recovery by reason of the injury being remote, if he acts reasonably.

*Eckert v. The Long Island R. R. Co.*⁴²³ is a leading case allowing recovery. There plaintiff's intestate, seeing a little child on the tracks of defendant's railroad, and a train swiftly approaching so that the child would be almost instantly crushed unless immediate effort was made to save him, in the sudden exigency of the occasion rushed to save the child, and succeeding in that, lost his own life by being run over by the train. Held, that plaintiff's intestate, voluntarily exposing himself to the dangers for the purpose of saving the child's life, was not, as a matter of law, negligent on his part, precluding a recovery,

⁴¹⁵ *Owen v. Cook* (1899) 9 N. D. 134, 81 N. W. 285.

⁴¹⁶ *Liming v. Illinois Central R. Co.*, *supra* note 411.

⁴¹⁷ *Henry v. Cleveland R. Co.*, *supra* note 411.

⁴¹⁸ *Gulf, Colorado & Santa Fe Ry. v. Bennett* (1920) 110 Tex. 262, 219 S. W. 197.

⁴¹⁹ *Chattanooga Light & Power Co. v. Hodges* (1902) 109 Tenn. 331, 70 S. W. 616.

⁴²⁰ (C. C. D. N. H. 1899) 39 Fed. 255.

⁴²¹ *Logan v. Wabash R. R.* (1902) 96 Mo. App. 461, 70 S. W. 734; *Seale v. Gulf, Colorado & Santa Fe Ry.* (1886) 65 Tex. 274.

⁴²² *Cook v. Johnston*, *supra* note 411 (risking her life to save property barred plaintiff); *Berg v. Great Northern Ry.*, *supra* note 414.

⁴²³ (1871) 43 N. Y. 502.

and that the court did not err in refusing to non suit on that ground. The case has been followed in New York⁴²⁴ and in other states.⁴²⁵

⁴²⁴ Spooner v. Delaware, Lackawanna & Western R. R. (1889) 115 N. Y. 22, 21 N. E. 696 (plaintiff in seeking to get children off tracks gets foot caught and is hit by train); Gibney v. State of New York (1893) 137 N. Y. 1, 33 N. E. 142 (father plunges into canal to rescue son who had fallen through an opening in a bridge); Manzella v. Rochester Ry. (1905) 93 N. Y. Supp. 457 (deceased, a girl of fifteen, attempting to rescue a child of five off tracks, steps back and is struck by car from opposite direction); Waters v. Taylor Co. (1916) 218 N. Y. 248, 112 N. E. 727 (plaintiff injured while seeking to release a co-employee from a cave-in of an embankment); Wagner v. International Ry. (1921) 232 N. Y. 176, 133 N. E. 437 (plaintiff falls through a trestle in search of a cousin wrongfully thrown out of a car by defendant while crossing the trestle).

⁴²⁵ West Chicago St. R. R. v. Liderman (1900) 187 Ill. 463, 58 N. E. 367 (plaintiff injured in attempting to rescue her child from in front of defendant's cars. Court says, by way of dictum, that if plaintiff's child had been put in perilous position by the negligence of plaintiff herself, then plaintiff could not have recovered, even though she had been exercising reasonable care in rescuing the child); Becker v. Louisville & Nashville R. R. (1901) 110 Ky. 474, 61 S. W. 997 (plaintiff sought to rescue child caught between ties on defendant's tracks); Peyton v. Texas & Pacific Ry. (1889) 41 La. Ann. 861, 6 So. 690 (plaintiff injured in attempting to rescue drunken man); Linnchan v. Sampson (1879) 126 Mass. 506 (plaintiff rushed out to rescue his servant who was being gored by defendant's bull ox, was tossed in the air by the bull and injured); Dixon v. New York, New Haven and Hartford R. R. (1910) 207 Mass. 126, 92 N. E. 1030 (plaintiff was injured in attempting to rescue a teamster who was clinging to the reins of horses which carried him in front of defendant's approaching train); Perich v. Leetonia Mining Co. (1912) 118 Minn. 508, 137 N. W. 12 (plaintiff seeks to rescue M from a blast of dynamite and is injured); Donahoe v. Wabash, St. Louis & Pacific Ry. (1884) 83 Mo. 560 (plaintiff injured in attempting to rescue her child from in front of defendant's train); Saunders v. Boston & Maine R. R. (1927) 82 N. H. 476, 136 Atl. 264 (a street car ran upon a pedestrian by reason of the fact that there were no fenders to prevent the accident. The motorman, in an attempt to relieve the pedestrian who was pinned beneath the car, strained himself and suffered rupture. The court held that the railroad company was not the proximate cause of the injury. If the motorman was acting reasonably this case seems out of accord with the cases generally); Pennsylvania Co. v. Langendorff (1891) 48 Ohio St. 316, 28 N. E. 172 (plaintiff injured in attempt to rescue child from defendant's approaching train); Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Lynch (1903) 69 Ohio St. 123, 68 N. E. 703 (plaintiff, a flagman at a crossing, is injured in attempting to rescue a woman who negligently slipped in front of a moving caboose); Gillilan v. Portland Crematorium Ass'n. (1926) 120 Or. 286, 249 Pac. 627 (defendant was held liable for plaintiff's decedent whose death resulted from her attempt to lift a slab which had fallen on her son through the negligence of defendant); Corbin v. Philadelphia (1900) 195 Pa. 461, 45 Atl. 1070 (plaintiff's son going to the rescue of one overcome by gas was himself overcome and died); Brenisholtz v. The Pennsylvania R. R. (1910) 229 Pa. 88, 78 Atl. 37 (plaintiff, mother of children all sleeping in plaintiff's dwelling, the rear of which was demolished by defendant's freight train backing off the end of a siding, frightened by the crash, sprang to the rescue of her children and fell through an opening and was injured); Mobile & Ohio R. R. v. Ridley (1905) 114 Tenn. 727, 86 S. W. 606 (plaintiff's intestate rushed onto a track to rescue a boy from an approaching train, saved the boy, but stumbled and was run over and killed); Wichita Falls Traction Co. v. Hibbs (Tex. Civ. App. 1919) 211 S. W. 287 (mother burnt her hands extinguishing fire

There is often difficulty in these rescue cases of finding violation of duty to plaintiff. Very often no mention is made of foreseeability,⁴²⁰ and in many of them the act of rescue could not be reasonably foreseen. That should make no difference if culpability toward plaintiff is once established. Defendant has provoked the act of rescue and it is a reasonable and justifiable one. Policy and fairness both demand that the loss should fall where the law places it, on the wrongdoing defendant, rather than on the rescuer or the one injured by defendant.

It is not necessary that the act of rescue be an instinctive or impulsive act. For example in *Warner v. International Ry. Co.*,⁴²⁷ plaintiff's cousin was thrown out while the car was passing over a trestle. After the car stopped, plaintiff went in the darkness upon the bridge in search of his cousin, missed his footing and fell from the trestle. The court held he could recover for his injuries, observing that plaintiff had time to reflect and weigh, saying, "It is enough that the act whether impulsive or deliberate, is the child of the occasion."

Suppose defendant's wrong is a cause in fact of the injury to the rescuer, but his act did not cause the intervening act of the rescuer, should defendant be held liable if such intervening act was not fore-

which was burning her child's clothes); *Christiansen v. Los Angeles & S. L. R. R.* (Utah 1930) 291 Pac. 926 (plaintiff lost leg in attempting to rescue his minor son); *Southern Ry. v. Baptist* (1913) 114 Va. 723, 77 S. E. 477 (an old man was approaching a railway crossing of the defendant railway company when several people warned him that a train was approaching. He thereupon stopped, about forty feet from the track. When the train came in sight, the old man called for help, and plaintiff rushed out and attempted to hold the horse by the bridle. As the train drew near, the horse became more frantic, and plaintiff hung to his head. Just as the train reached the crossing, the horse rushed across the track, throwing plaintiff into the engine, injuring him dreadfully. Plaintiff now sues for these injuries. The negligence of defendant consisted in its not stopping the train after it saw the peril of plaintiff. *Held*, that plaintiff could recover); *Wilder v. Stanley* (1893) 65 Vt. 145, 26 Atl. 189 (plaintiff's colt escaped from its pasture through a defect in the division fence into defendant's pasture which it was defendant's duty to maintain. A stranger attempted to drive the colt back into plaintiff's pasture, and in doing so, caused the colt to run into a barbed wire fence, which severed the colt's jugular vein, and he died therefrom. The court held that defendant's negligence in not keeping the fence in repair, was the proximate cause of the death of the colt); *Mobus v. Town of Waitsfield* (1902) 75 Vt. 122, 53 Atl. 775 (a bridge broke and horses, cart and husband were thrown into the water. Plaintiff, in attempting to rescue her husband, was kicked by the foundering horses); *Walters v. Appalachian Power Co.* (1915) 75 W. Va. 676, 84 S. E. 617 (plaintiff in attempting to rescue *M* from a charged wire, himself received a charge); *Bond v. Baltimore & Ohio R. R.* (1918) 82 W. Va. 557, 96 S. E. 932 (1920) 5 A. L. R. 206 (plaintiff was injured in rescuing a woman who was negligent, from in front of defendant's train); see Note (1922) 19 A. L. R. 4.

⁴²⁶ *Wagner v. International Ry.*, *supra* note 424.

⁴²⁷ *Ibid.*

seeable? *Sarber v. Indianapolis*,⁴²⁸ presents such a case. The city of Indianapolis negligently permitted a barbed wire to lie in water six to eight feet deep which it maintained for boating. A racing motorboat negligently upset some canoeists and plaintiff's son dived to rescue one of them and became entangled in the wire and was drowned. The court held that defendant city was not the proximate cause of the injury because there intervened an independent unforeseeable act which caused it. As the court conceives it, the case falls clearly under the general rule that consequences are not proximate where they result from an unforeseeable independent cause, but do not the facts warrant the inference that the final intervening cause was plaintiff's diving into the wires, the foreseeability of which intervening act was what made defendant's conduct negligent? We should not concern ourselves with the unforeseeability of earlier intervening causes. The rescue cases holding defendant liable are no exception to this general rule for they are all cases in which the intervening causes were not independent but were caused by defendant's wrong.

d. To Mitigate or Repair the Damage Done by Defendant's Act.

Where plaintiff has suffered injuries through the wrongful act of defendant and they reasonably demand the attention of a physician or surgeon and defendant uses reasonable diligence and care in employing a doctor of ordinary skill in his profession,⁴²⁹ the aggravated damages resulting from the negligence, mistakes or lack of skill of such doctor in treatment of the ailment is a proximate result of defendant's original wrongful act.⁴³⁰

A strange distinction is taken between the case where the injured person selects the physician or surgeon and the case where defendant selects him. With few exceptions,⁴³¹ in the latter case defendant is not held liable for the aggravated results of the physician's or surgeon's

⁴²⁸ (1920) 72 Ind. App. 594, 126 N. E. 330.

⁴²⁹ *Reed v. City of Detroit* (1896) 108 Mich. 224, 65 N. W. 967.

⁴³⁰ *State v. Gabriella* (1913) 163 Iowa 297, 144 N. W. 9; *Stover v. Inhabitants of Bluehill* (1863) 51 Me. 439; *Tuttle v. Farmington* (1876) 58 N. H. 13; *Lyons v. The Erie Ry.* (1874) 57 N. Y. 489; *Sauter v. The New York Central and Hudson River R. R.* (1876) 66 N. Y. 50; *Commonwealth of Pennsylvania v. Eisenhower* (1897) 181 Pa. 470, 37 Atl. 521; *McMillan v. State* (1910) 58 Tex. Crim. Rep. 525, 126 S. W. 875; *Regina v. Davis & Wagstaff* (1883) 15 Cox C. C. 174; *Notes* (1920) 8 A. L. R. 506; (1925) 39 *ibid.* 1268. *Contra*: *Schmidt v. Mitchell* (1876) 84 Ill. 195.

The aggravation of consequences of personal injuries received through defendant's wrongful act by the use of opiates under the direction of a reputable physician allowed. *Pyke v. City of Jamestown* (1906) 15 N. D. 157, 107 N. W. 359.

⁴³¹ *Martin v. Cunningham* (1916) 93 Wash. 517, 161 Pac. 355.

negligence in treating the wound.⁴³² An examination of these cases makes it obvious that the courts have made a *faux pas*. They have assumed that the basis of defendant's liability in such case depends upon the existence of the relation of master and servant. For example, in *Louisville & Nashville R. R. v. Foard* the court says:⁴³³

"In the employment by a railroad company of its surgeons to attend the persons injured by its trains, the relation of master and servant and principal and agent does not exist; and if the railroad company is careful, and selects suitable surgeons, it is not responsible for their neglect or malpractice."

The courts in these cases have failed to observe that the question is not whether the railroad company is liable for the physician's negligence on the doctrine of *respondeat superior* but whether defendant, by his original wrongful act, caused the damage in question. He proximately caused it if the intervening act of the surgeon did not make the damage remote, and the answer to that question should not turn on who selected the surgeon.

When plaintiff has done his part to relieve himself from the consequences of defendant's wrong and to mitigate the damages, he should not be penalized for the negligent act of the surgeon or doctor or nurse he employs. It is not asking too much of plaintiff when he is acting to relieve himself from the consequences of defendant's act, to act reasonably and normally, and if damages are aggravated by the negligence of the doctor or nurse he employs, if the doctor or nurse honestly seeks to relieve the condition they are employed to treat, defendant's wrong should be treated as a substantial factor in producing the aggravated damage. Where the physician fails to act *bona fide*,⁴³⁴ however, the physician has used the occasion to work his own malicious purpose. In that case defendant's act diminishes in importance as a cause as compared with the intervening wrongful act of the doctor. Defendant has only offered an opportunity to the physician to work his will and his cause is not such a substantial factor that it should be treated as the proximate cause.

e. To Prevent Deprivation of Rights

If defendant wrongfully seeks to imprison plaintiff or a third person or to prevent him from entering his own premises or from repossessing himself of his own property or using the highway and plaintiff or a third

⁴³² Notes (1920) 8 A. L. R. 515; (1925) 39 *ibid.* 1269.

⁴³³ (1898) 104 Ky. 456, 462; 47 S. W. 342, 343.

⁴³⁴ See *McDaniel v. State* (1884) 76 Ala. 1; *Bush v. Commonwealth* (1880) 78 Ky. 268; *Purchase v. Seelye* (1918) 231 Mass. 434, 121 N. E. 413; *Beale, op. cit. supra* note 172, at 649.

person causes damages in a reasonable effort to prevent this deprivation of rights, defendant's wrong should be treated as the substantial factor or proximate cause of such damage. And this is true whether or not defendant could have foreseen the preventative measures which the intervening actor used. The result reached in *Clark v. Chambers*⁴³⁵ is defensible on this ground rather than on that of foreseeability of the intervening cause.

f. To Defend from Attack

Where defendant sets in operation a force, or omits a duty to stop a force, which causes plaintiff or a third person to act in reasonable self defense, the consequences resulting directly from such defensive acts are proximate and this is true whether the defensive act was foreseeable or not.⁴³⁶

Where a union commander, in defense from an attack by a rebel force, destroyed military supplies to keep them from falling into enemy hands, it was held that the insurance company was exempt from liability on a policy excepting losses caused by invasions and insurrections.⁴³⁷ Where an insured person makes an attack on a woman whose husband, in defense, shoots him, the insurance company escapes under a provision exempting it from liability for death caused by the insured's own hand.⁴³⁸ Defendant has been held liable for a death caused by a train crew who fired in defense when attacked by defendant and others.⁴³⁹

Charles E. Carpenter.

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⁴³⁵ *Supra* note 294; see text to note 294, *supra*.

⁴³⁶ See notes 437-439, *infra*.

⁴³⁷ *Insurance Co. v. Boon* (1877) 95 U. S. 117.

⁴³⁸ *Bloom v. Franklin Life Ins. Co.* (1884) 97 Ind. 478.

⁴³⁹ *Keaton v. State* (1900) 41 Tex. Crim. Rep. 621, 57 S. W. 1125; see *Commonwealth v. Campbell* (1863) 89 Mass. (7 Allen) 541.