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use of the insured's name would result in a more sympathetic treatment by the jury than if the insurance company itself brought the action. Where the insurance covers the entire loss, the question of who is the real party in interest may depend upon whether there as been in fact a loan or a full payment. However, this loan device is of very doubtful utility in the case of a claim arising under an automobile collision policy containing a deductible clause. Regardless of whether the insurer has paid or loaned the amount of the damage, less the deductible figure, the court will require the use of the insured's name as the real party in interest unless one of the procedures outlined above is employed to vest this title in the insurer.

ALLAN W. MARKHAM

Torts—Insulating Negligence in North Carolina

The doctrine of insulating negligence and the task of predicting how the court will hold in an intervening negligence situation continue to be problems in North Carolina. The issue of insulation arises when one party through a negligent act or omission has created an unreasonable risk of harm to others and a second actor through a subsequent act or omission brings the risk to reality to the injury of the plaintiff. The problem is whether the two tort-feasors may be held jointly liable or whether the first tort-feasor is insulated by the later negligence of the second tort-feasor. Our court has said that the problem of insulating negligence is one of proximate cause and that the test is whether the

Quaere, whether this assumption is valid today where often there is an insurer behind the plaintiff in automobile damage suits, and most jurors are aware of this fact.

In Cunningham & Hinshaw v. Seaboard Air Line Ry., 139 N.C. 427, 51 S.E. 1029 (1905), it was determined by the jury that the "loan" was in fact a full and final payment of the plaintiff-insured's claim by the insurer, thereby divesting the insured of any standing to sue on the claim. Contra, Sosnow, Kranz & Simcoe, Inc. v. Storatti Corp., 269 App. Div. 122, 54 N.Y.S.2d 780 (1945), where a suit in the insured's name under a similar loan agreement was permitted, as it did not prejudice the defendant, i.e., it would not allow the plaintiff a double recovery nor make the defendant liable to multiple suits for the same wrong. Accord, McCann v. Dixie Lake & Realty Co., 44 Ga. App. 700, 162 S.E. 869 (1932).

The court will not, however, raise the issue ex nero nato if the defendant does not object. Southern Stock Fire Ins. Co. v. Southern Ry., 179 N.C. 290, 102 S.E. 504 (1920).

Montgomery v. Blades, 222 N.C. 463, 23 S.E.2d 844 (1943); Luttrell v. Carolina Mineral Co., 220 N.C. 782, 18 S.E.2d 412 (1942); Butner v. Spease, 217 N.C. 82, 6 S.E.2d 808 (1940). The generally accepted definition of proximate cause in North Carolina is that announced in Adams v. State Bd. of Educ., 248 N.C. 505, 511, 103 S.E.2d 854, 857 (1958): "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed." McIntyre v. Monarch Elevator & Mach. Co., 230 N.C. 539, 54 S.E.2d 45 (1949); Gant v. Gant, 197 N.C. 164, 148 S.E. 34 (1929); Van Dyke v. Chad-
first tort-feasor could reasonably foresee the intervening act.\(^2\) The following discussion is broken down into types of fact situations in which the court has tended to be inconsistent and an indication of several areas in which it has tended to be consistent in cases decided since 1954.\(^3\)

**Intersection Collisions**

In cases involving intersection collisions where the first tort-feasor is driving on the dominant highway and the second tort-feasor enters from a servient highway the court has applied differing tests. In *Loving v. Whitten*\(^4\) plaintiff was a passenger in A's car, which on entering from the servient highway collided with B's car. Plaintiff alleged that A and B were concurrently negligent in that A failed to stop at a stop sign and B was speeding, failed to maintain a proper lookout, and failed to keep his car under control. The court sustained B's demurrer, saying that reasonable unforeseeability of the intervening act is the test for insulation and that in the absence of allegations of fact that B observed or should have observed that A did not intend to stop, B was entitled to assume that A would observe the law.\(^5\) The court also said that irrespective of his own negligence B could not have avoided the collision which the conduct of A made inevitable.\(^6\)

In *Blalock v. Hart*,\(^7\) a case arising on facts similar to those in the *Loving* case, the court held that there was sufficient evidence to go to the

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\(^2\) The court also said that irrespective of his own negligence B could not have avoided the collision which the conduct of A made inevitable.

\(^3\) 241 N.C. 273, 84 S.E.2d 919 (1954).


\(^5\) In the latter statement it appears that the court is saying that the negligence of B was not an actual cause of the collision. To recover plaintiff must prove: (1) that defendant was negligent; (2) that defendant's negligence actually caused plaintiff's injury; and (3) that plaintiff's injury was reasonably foreseeable. See note 1 supra. If the court decided that defendant's negligence was not an actual cause of the collision, it would seem that the issue of insulation should not have been reached.

\(^6\) 239 N.C. 475, 80 S.E.2d 373 (1954).
jury as against both defendants. The court said that, though there was no duty on the part of B to foresee negligence, he had a duty of due care which included maintaining a reasonable speed, keeping a proper lookout, and taking such action as an ordinarily prudent person would take to avoid the collision when he noticed or should have noticed that A was not stopping. These cases are difficult to distinguish. The court emphasizes the dominant driver's "duty of due care" in Blalock. Such an emphasis does not afford a logical distinction between the cases, for the question of insulation does not arise until it is established that both defendants have breached their duty of due care. It may be that the court found that B should have observed that A was not stopping. If this is true, the holding is sound, but such a finding would not seem warranted by the court's statement of facts.

In Primm v. King, arising on facts similar to those in Loving and Blalock, the court refused to insulate the negligence of B, the dominant driver, because there was a factual showing that B was on actual notice that A was not going to stop. Thus, while Loving and Prim are clearly consistent, Blalock conflicts with this line of cases.

Rear-end Collisions

Another area in which confusion has been created by recent decisions is that of rear-end collisions. One type situation is that represented by Potter v. Frosty Morn Meats, Inc., where plaintiff was injured when the car in which she was a passenger collided with the rear of a truck owned by Frosty Morn which was stopped in the road. Plaintiff sued defendant Potter, the driver of her car, and the trucker. After the trial court sustained the demurrer of Frosty Morn, defendant Potter filed a
cross-action against Frosty Morn for contribution. The court, in sustaining Frosty Morn's demurrer to the cross-complaint, said that it was the active negligence of defendant Potter in failing to observe the truck which proximately caused the collision. The court relied on the language in Butner v. Spease" that "if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another or others, the injury is to be imputed to the last wrong as proximate cause . . . ." But it is submitted that parking a truck in the highway is indicative of negligence. And if the trucker was negligent, the intervening act and resulting injury would seem to be foreseeable consequences of the risk created.

A similar situation is presented in Howze v. McCall. As plaintiff was proceeding along the highway, a car belonging to defendant Lyons appeared parked in plaintiff's lane. As plaintiff applied his brakes, he was struck from behind by a car driven by defendant McCall. In plaintiff's suit against both alleged tort-feasors, the court sustained Lyons' demurrer, saying that, even conceding negligence on the part of defendant Lyons, there would have been no collision but for the intervening acts of defendant McCall. When viewed in the light of previous decisions in cases of a similar nature, the decision in Howze is clearly consistent with the previous holdings. Despite the consistency, how-
ever, the use of the "but for" test in *Howze* seems questionable.\(^{24}\) The question should have been whether the intervening act and plaintiff's injury were reasonably foreseeable.\(^{26}\)

In contrast to the above situation, in rear-end collision cases where the acts of the two tort-feasors have been more nearly concurrent in point of time, the court has been consistent in refusing to insulate. Thus, in *Riddle v. Artis*\(^{27}\) plaintiff alleged that defendant Artis skidded across the centerline and collided with his automobile and that defendant Morris negligently ran into the rear of plaintiff's automobile. The demurrer of defendant Morris, the original wrongdoer, was overruled, the court saying that in order for the doctrine of insulating negligence to apply, the intervening act must be a new and independent force which turns aside the natural course of events set in motion by the original wrongdoer "and produces a result which would not otherwise have followed and which could not have been reasonably anticipated."\(^{28}\) This decision also seems to be in line with the court's holdings in previous cases of the same or similar character.\(^{29}\) The use of the foreseeability test is undoubtedly correct. It is to be noted that here the original wrongdoer is not being required to foresee negligence, but he is bound to foresee that, if for any reason the plaintiff is forced to slow down, it is likely that he will not be able to stop in time to avoid hitting plaintiff's car. It is difficult to see why the court reached a different result in *Howze* from that reached here. Clearly, in both the negligence of the first tort-feasor remains active until the moment of impact. It is submitted that the court should have refused to insulate in the *Howze* case.

*Where the Plaintiff Is Beyond the Zone of Immediate Danger*

The reasoning of the court has also differed in cases where the plaintiff was beyond the zone of immediate danger created by the negli-

\(^{24}\) For a discussion of the "but for" test see note 1 supra.

\(^{25}\) The "but for" test is a test for actual cause, not for insulation. The court in saying, "but for the act of McCall no collision would have occurred," has only established that McCall's negligence was an actual cause of the collision, not that it was such a cause that Lyons should be insulated. Indeed, it might be said that "but for" the negligence of Lyons (in parking his car on the highway so that plaintiff had to put on his brakes) no collision would have occurred. Proximate cause is a two-pronged rule, requiring actual cause and foreseeability. For example, in Henderson v. Powell, 221 N.C. 239, 19 S.E.2d 876 (1942), the original tort-feasor argued that "but for" the intervening act no injury would have occurred and that, therefore, he should be insulated. The court rejected this, holding that there might be several causes of an injury and that, in order for one cause to insulate another cause, the second cause must be unforeseeable.

\(^{26}\) See Smith v. Grubb, 238 N.C. 665, 78 S.E.2d 598 (1953), which combines the two tests.

\(^{27}\) 243 N.C. 668, 91 S.E.2d 894 (1956).


gence of the two tort-feasors. In *Boone v. North Carolina R.R.*, where defendant's train struck a man on the track and hurled his body against plaintiff's intestate who was twenty-five feet away, causing her death, defendant's demurrer was sustained. The court said that actionable negligence does not exist unless the act proximately caused the injury and that this requires foreseeability of injury. Since a defendant is under no duty to foresee negligence on the part of another, in the absence of notice to the contrary he may assume that the other will exercise ordinary care for his own safety. Therefore, the negligence of the man on the track was the sole proximate cause of the death of plaintiff's intestate.

In an unusual case, *Aldridge v. Hasty*, defendants Burns and Hasty were approaching one another from opposite directions on the highway when, at a point twenty feet apart, Burns turned left in front of Hasty. In swerving to the left to avoid the inevitable collision, Hasty's car went across the road, jumped a ditch and an embankment, went three hundred feet up into plaintiff's yard, struck the plaintiff and two cars in plaintiff's driveway, continued on and mired down in a plowed field one hundred feet beyond. The court, refusing to insulate Hasty, said that as to the original collision the negligence of Burns insulated any prior negligence of Hasty and was the sole proximate cause of the original collision. But, it said, if Hasty was driving at such an excessive rate of speed that he could not thereafter control his car and avoid hitting the plaintiff, his negligence was a proximate cause of the plaintiff's injury. The court in *Hasty* has apparently held that plaintiff's injury could be found to be foreseeable notwithstanding the unforeseeability of the intervening act. If the intervening act was unforeseeable, it would seem that there could be no foreseeable injury resulting from the

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51 Plaintiff alleged that defendant's engineer was negligent in driving the train at seventy-five to ninety miles per hour, in failing to keep a proper lookout, and in failing to warn.
52 As a general rule, the statement that one is not bound to foresee negligence on the part of another appears to be unsound. The very fact that the first tort-feasor in an intervening negligence situation is not always insulated weakens the axiom. See Henderson v. Powell, 221 N.C. 239, 19 S.E.2d 876 (1942); Bechtler v. Bracken, 218 N.C. 515, 11 S.E.2d 721 (1940); Gold v. Kiker, 216 N.C. 511, 5 S.E.2d 548 (1939); Harton v. Forest City Tel. Co., 141 N.C. 455, 54 S.E. 299 (1906).
53 There is room for substantial doubt that the court decided the *Boone* case on the issue of insulation. The court seemed to consider the problem one of duty to a plaintiff off the track, and it is possible that the court decided that the defendant was not negligent as to plaintiff's intestate. However, in view of plaintiff's allegation that the train was proceeding at seventy-five to ninety miles per hour with the engineer failing to keep a proper lookout, it seems that the issue of insulation could properly have been decided.
54 240 N.C. 353, 82 S.E.2d 331 (1954).
55 This is in accord with Butner v. Spease, 217 N.C. 82, 6 S.E.2d 808 (1940).
56 The application of such a principle, holding the injury foreseeable notwithstanding the unforeseeability of the intervening act, has not been found in any other North Carolina cases.
act. It is submitted that the criteria of these two cases should have been the same, i.e., one of reasonable foreseeability of the intervening act and reasonable foreseeability of injury to the plaintiff.

Cases Consistent With Prior Authority

In other cases a degree of consistency has been reached. In *Faircloth v. Atlantic Coast Line R.R.* the court reaffirmed its prior holdings that when the driver of the automobile in which plaintiff is a passenger collides with the side of a moving train, the railroad will be insulated, despite its negligent failure to warn.

The court has likewise maintained a degree of consistency in cases where the first tort-feasor has negligently failed to warn that he has, for a proper purpose, made the highway unsafe for travel. In *White v. Dickerson, Inc.*, where the defendant was a construction company which failed to provide adequate warning that a bridge over a canal was out and the driver of the automobile in which the plaintiff was a passenger drove into the canal, the court refused to insulate the construction company, the original wrongdoer, holding the intervening act reasonably foreseeable. It appears that there is no justification for the differences of reasoning which allow insulation in the stopped-car, rear-end collision cases but refuse insulation in a case where the first tort-feasor has failed to warn that he has made the highway unsafe for travel. In both types of cases the negligence of the first tort-feasor has continued in active operation until the injury and was an actual cause of the injury, and in both the injury which occurred was reasonably foreseeable as within the risk created.

CONCLUSION

It is thus apparent that there is confusion and inconsistency not only within but also among the particular types of fact situations. Throughout the entire field of insulating negligence the lack of uniformity in reasoning or tests applied is most alarming.

It is submitted that the court should adhere to the well recognized test for insulation—foreseeability of the intervening act. That such a

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37 247 N.C. 190, 100 S.E.2d 328 (1957).
38 Chinnis v. Atlantic Coast Line R.R., 219 N.C. 528, 14 S.E.2d 500 (1941); Herman v. Atlantic Coast Line R.R., 197 N.C. 718, 150 S.E. 361 (1929).
40 In Price v. City of Monroe, 234 N.C. 666, 68 S.E.2d 283 (1951), defendant had dug a ditch across the street for the purpose of installing a new culvert; dirt was piled up on the sides but there were no signs or warning lights. Plaintiff and her husband, the driver, were proceeding along the street, and though plaintiff's husband saw the dirt, he drove into the ditch. In affirming the judgment for plaintiff the court said that the test is reasonable unforeseeability of the intervening act, and that defendant should have foreseen the damage due to lack of warning. See also Gold v. Kiker, 216 N.C. 511, 5 S.E.2d 548 (1939). It is hoped that this line of reasoning will overrule that of Haney v. Town of Lincolnton, 207 N.C. 282, 176 S.E. 573 (1934), which is contra.
practice would lessen the number of insulations is unquestionable, and this in itself would be a laudable result in view of the fact that in every dual negligence situation a wrongdoing defendant has actually caused harm to an innocent plaintiff. At the same time, and probably more important in the long run, exclusive use of the foreseeability test would eliminate such confusion and inconsistency as that appearing in cases since 1954.

JAMES Y. PRESTON

Trusts—United States Savings Bonds—Resulting or Constructive Trust on Proceeds in the Hands of Surviving Co-owner

In the recent case of Tanner v. Ervin a husband and wife jointly purchased United States Savings Bonds, Series E. The bonds were issued in their names in the alternative. Subsequently they entered into a separation and property agreement wherein for a valuable consideration the wife transferred her interest in the bonds to her husband. Thereafter he died with the bonds in his possession but without having changed the registration of the bonds to his name alone.

The wife brought an action against the deceased's executor claiming that under the treasury regulations she, as the surviving co-owner of the bonds, was the sole owner of the bonds and their proceeds. The trial court agreed with the wife's contention that the treasury regulations were controlling.

On appeal, the North Carolina Supreme Court by a four-to-three decision reversed. The court held that while only the surviving co-owner might cash the bonds, this did not prevent a state court from directing the wife to do so and impressing the proceeds therefrom with a resulting trust for the benefit of the deceased's executor.

Although the pertinent treasury regulation states in effect that upon the death of one co-owner the surviving co-owner is alone entitled to receive the proceeds from the government, most courts that have ruled on the issue have felt free to reach what they considered the equitable disposition of the proceeds. The reasoning behind this, as the court pointed out in Tanner v. Ervin, is that when the bonds are cashed,

2 By the property agreement the wife received two Orange Drink stores in Charlotte and the home in which she and her husband had lived; the husband received a 22,467.00 dollar savings account and two checking accounts totaling 24,367.45 dollars in addition to the bonds that had a present value of 17,323.00 dollars.
3 "If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving coowner will be recognized as the sole and absolute owner of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor." 31 C.F.R. § 315.45 (Supp. 1945) (as amended 31 C.F.R. § 315.61 (1959)). Substantially identical provisions and regulations apply to all the bonds here under consideration.