Proximate Cause in North Carolina Tort Law

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THE CONCEPT OF CAUSATION

Causation is a legal doctrine used by courts to impose appropriate limitatons upon tort liability. The requirement of a cause-in-fact relationship between conduct and harm[1] limits a tortfeasor's liability not only to consequences actually caused by such conduct[2] but also to those that would not have occurred without it.[3] The existence of a cause-in-fact relationship, however, does not establish liability since under the rules of proximate cause considerations of policy and fairness are taken into account to limit a tortfeasor's liability short of all consequences his conduct may have caused.[4]

The notion that some harm of the general type that has occurred be foreseeable is the overriding principle adopted by most courts to limit liability for negligence.[5] Through this broad principle courts have attempted to limit liability to those risks on account of which a tortfeasor's conduct is found to be negligent and thus to deny recovery for harm caused by other risks whether they are associated with the tortfeasor's conduct or arise independently of it.[6] North Carolina follows the foreseeability approach.[7] However, here, as elsewhere, a number of fac-

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[1]For a discussion of actual causation *see* Byrd, *Actual Causation in North Carolina Tort Law*, 50 N.C.L. REV. 261 (1972).

[2]Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968) (failure to give traffic signal that would not have been seen had it been given); Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963) (absence of light on bicycle played no part in causing accident); Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959) (no showing that substance sprayed on pond caused death of fish).

[3]Holland v. Malpass, 255 N.C. 395, 121 S.E.2d 576 (1961) (accident could not have been avoided had defendant been driving at safe speed); Lane v. Eastern Carolina Drivers Ass'n, 253 N.C. 764, 117 S.E.2d 737 (1961) (protective barrier, had it been present, would have provided no protection from speeding race car); Ham v. Greensboro Ice & Fuel Co., 204 N.C. 614, 169 S.E. 180 (1933) (truck backed negligently; child under truck, would have been struck had truck been driven forward).

[4]Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967) (charge that permitted recovery upon finding of negligence and actual causation held erroneous); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966) (same).

[5]Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

[6]Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964) (cruelty-to-animal statute not intended for ptoection of humans); Ward v. Southern Ry., 206 N.C. 530, 174 S.E. 443 (1934) (although thieves could be anticipated, injury to employee unforeseeable when stolen coal was thrown off railway car); Brewster v. Elizabeth City, 137 N.C. 392, 49 S.E. 885 (1905) (plaintiff's failure to watch where he was walking may not include risk that plank on which he stepped would "fly up" and hit him).

tors[8] other than foreseeability have influenced the determination of the extent of liability and have resulted in imposition of liability beyond,[9] and short of,[10] foreseeable risks.

The language of causation is unfathomable. It is replete with loaded words upon the choice of which the existence of liability seems to depend. "Direct," "natural and probable," "real," "efficient," and "dominant" are words employed when liability exists.[11] The absence of liability is disclosed by such words as "remote," "passive," and "condition."[12] When third persons or other forces intervene between a tortfeasor's conduct and a claimant's injury, phrases such as "unbroken chain of causation," "intervention of a distinct wrongful act," and "sole cause" assume importance.[13] Critics have shown little resistance to the

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[7]Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966); Pettus v. Sanders, 259 N.C. 211, 130 S.E.2d 330 (1963).

[8]A narrower range of policy considerations than bear upon the question whether any liability exists in the first instance have affected the determination of the extent of liability.

[9]Potts v. Howser, 274 N.C. 49, 161 S.E.2d 737 (1968) (liability for aggravation of preexisting condition); Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964) (liability for unforeseeable consequences of foreseeable impact upon person); Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940) (liability beyond foreseeable risks for intentional tort).

[10]Rulane Gas Co. v. Montgomery Ward & Co., 231 N.C. 270, 56 S.E.2d 689 (1949) (shifting responsibility; seller of defective hot water heater not liable for explosion when service man, aware of presence of gas vapors, struck match which ignited them); Ferguson v. City of Asheville, 213 N.C. 569, 197 S.E. 146 (1938) (intervening negligence; driver's negligence in failing to discover ramp negligently placed in street by city relieved city of liability to third party); Johnson v. Atlantic Coast Line R.R., 184 N.C. 101, 113 S.E. 606 (1922) (no recovery for economic loss); Kimberly v. Howland, 143 N.C. 399, 55 S.E. 778 (1906) (no recovery for negligently inflicted mental harm unless contemporaneous or resulting physical injury) (dictum).

[11]Taney v. Brown, 262 N.C. 438, 445, 137 S.E.2d 827, 831 (1964) ("direct chain of events"); Rowe v. Murphy, 250 N.C. 627, 633, 109 S.E.2d 474, 479 (1959) ("real, efficient cause"); Clark v. Lambreth, 235 N.C. 578, 585, 70 S.E.2d 828, 832 (1952) ("real, efficient cause"); Hodges v. Virginia-Carolina Ry., 179 N.C. 566, 570, 103 S.E. 145, 146 (1920) ("direct result"); Hudson v. Railroad, 142 N.C. 198, 206, 55 S.E. 103, 106 (1906) ("consequences which follow in unbroken sequence . . . are natural and proximate").

[12]Stockwell v. Brown, 254 N.C. 662, 667, 119 S.E.2d 795, 798 (1961) ("condition"); White v. Cason, 251 N.C. 646, 649-50, 111 S.E.2d 887, 890 (1960) ("passive"); Montgomery v. Blades, 218 N.C. 680, 684, 12 S.E.2d 217, 220 (1940) ("remote").

[13]Price v. Seaboard Air Line R.R., 274 N.C. 32, 44, 161 S.E.2d 590, 599 (1968) ("negligence . . . continued up to the very moment of impact"); Stutts v. Burcham, 271 N.C. 176, 180-81, 155 S.E.2d 742, 745-46 (1967) ("sole proximate cause"); Williams v. Mickens, 247 N.C. 262, 264, 100 S.E.2d 511, 513 (1957) ("the causal chain . . . is broken"); Alford v. Washington, 238 N.C. 694, 698, 78 S.E.2d 915, 918 (1953) ("independently and proximately produced by the wrongful act . . . of an outside agency"); Smith v. Grubb, 238 N.C. 665, 668, 78 S.E.2d 598, 600 (1953) ("intervening acts . . . acted as a nonconductor").

obvious temptation to decry the ineptness of this language to deal with problems of legal responsibility. However, much of this criticism may attribute to the languge greater significance than courts ever intended it to have. Although it is true that courts sometimes become entangled by causation language, they appear to use it to describe a result or conclusion concerning liability and not as a statement of basic principle or as an analytical tool for solution of scope-of-liability problems. The fact that neither principle nor analysis is disclosed probably reflects simply that the decision represents a determination reached after all the factors bearing upon the case have been considered.

Statements by the North Carolina Supreme Court that "proximate cause" is a question of fact[14] and is usually for the jury to decide,[15] if accepted at face value, are misleading. The question dealt with in terms of proximate cause is whether a tortfeasor is to be held liable for harm his negligence has in fact caused. That decision in the final analysis is not one of fact but instead is an evaluative determination. Although legal rules attempt to establish the boundaries of and guidance for this determination, it remains one that is subject to all the influences that bear upon human judgment.

Several factors limit the jury's role in deciding "proximate cause." An elaborate, though imprecise, rule structure has evolved out of the decided cases, and it may affect the determination whether the case is to be submitted to the jury,[16] and in the cases submitted, it is supposed to impose directions that the jury must follow in making its decision. North Carolina courts, trial and appellate, have shown little reluctance to decide the "proximate cause" question as a matter of law,[17] and

[14]*E.g.*, Conley v. Pearce-Young-Angel Co., 224 N.C. 211, 214, 29 S.E.2d 740, 742 (1940): "Proximate cause is an inference of fact, to be drawn from other facts and circumstances . . . . It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case."

[15]Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964); Davis v. Jessup, 257 N.C. 215, 125 S.E.2d 440 (1962); Bryant v. Woodlief, 252 N.C. 488, 114 S.E.2d 241 (1960); Woods v. Freeman, 213 N.C. 314, 195 S.E. 812 (1938).

[16]*See, e.g.*, Williams v. Mickens, 247 N.C. 262, 100 S.E.2d 511 (1957) (nonsuit affirmed; intervening criminal act unforeseeable); Davis v. Carolina Power & Light Co., 238 N.C. 106, 76 S.E.2d 378 (1953) (nonsuit affirmed; unforeseeable risk); Rulane Gas Co. v. Montgomery Ward & Co., 231 N.C. 270, 56 S.E.2d 689 (1949) (jury verdict overturned; liability shifted to third party who acted with knowledge of risk); Butner v. Spease, 217 N.C. 82, 6 S.E.2d 808 (1939) (jury verdict overturned; intervening culpable and gross negligence).

[17]*See, e.g.*, McLaney v. Anchor Motor Freight, Inc., 236 N.C. 714, 74 S.E.2d 36 (1952); Godwin v. Nixon, 236 N.C. 632, 74 S.E.2d 24 (1952); Shaw v. Barnard, 229 N.C. 713, 51 S.E.2d

although the court's role is not as dominant as the jury's, it is nonetheless a significant one.

Proximate cause has become something of a work horse for negligence law. It has been used to deny recovery in cases in which the law, because of the relationship between the parties[18] or the circumstances under which the accident occurred,[19] imposed no duty upon the defendant in relation to the injured person. Other cases have relied upon the proximate cause rationale when the evidence simply failed to disclose any negligence of the defendant.[20] In still others, proximate cause has been extended to envelop contributory negligence[21] and the closely related doctrine of last clear chance.[22] The confusion that has at times surrounded last clear chance[23] may be an unfortunate consequence of this envelopment. Perhaps the only significance of many of the above decisions is that they create additional confusion about a concept that is already burdened with great uncertainty.

The North Carolina Supreme Court often merges actual causation and proximate cause into a single issue: proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.[24] This practice may account for the occasional case in which the trial judge's charge on proximate cause erroneously defines it solely in terms of the "but for" standard of actual causation.[25] It

295 (1948); Beach v. Patton, 208 N.C. 134, 179 S.E. 446 (1935); Gant v. Gant, 197 N.C. 164, 148 S.E. 34 (1929).

[18]State *ex rel.* Garland v. Gatewood, 241 N.C. 606, 86 S.E.2d 195 (1955); Ellis v. Sinclair Ref. Co., 214 N.C. 388, 199 S.E. 403 (1938).

[19]Shaw v. Barnard, 229 N.C. 713, 51 S.E.2d 295 (1948); Ward v. Southern Ry., 206 N.C. 530, 174 S.E. 443 (1934); Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893).

[20]Leake v. Queen City Coach Co., 270 N.C. 669, 155 S.E.2d 161 (1967); White v. Cason, 251 N.C. 646, 111 S.E.2d 887 (1960); Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955); Cooley v. Baker, 231 N.C. 533, 58 S.E.2d 115 (1950).

[21]Luttrell v. Carolina Mineral Co., 220 N.C. 782, 18 S.E.2d 412 (1941); Stephens v. Blackwood Lumber Co., 191 N.C. 23, 131 S.E. 314 (1925).

[22]Hughes v. Vestal, 264 N.C. 500, 142 S.E.2d 361 (1965).

[23]*Torts, Eleventh Annual Survey of North Carolina Case Law*, 42 N.C.L. REV. 721, 723-26 (1964); 33 N.C.L. REV. 138 (1954).

[24]*E.g.*, Barefoot v. Joyner, 270 N.C. 388, 393, 154 S.E.2d 543, 547 (1967); Nance v. Parks, 266 N.C. 206, 209, 146 S.E.2d 24, 27 (1966).

[25]Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

probably also explains why cause-in-fact issues are sometimes dealt with in terms of proximate cause.[26]

FORESEEABILITY

The characterization of conduct as negligence involves the determination that it entails *foreseeable* risks of injury that are unreasonable under existing circumstances.[27] The most significant limitation-of-liability concept dealt with in terms of proximate cause is also foreseeability.[28] It limits a defendant's liability to those consequences that he can reasonably foresee will be caused by his negligent conduct. The broad thrust of the foreseeability rule is that the extent of liability as well as the basis of liability is to be determined by fault. Liability for negligence extends only to harm from unreasonable risks because of which the conduct was found to be negligent. Harm from other risks, although causally connected to the negligent conduct, is outside the scope of liability.

The principle of foreseeability used to limit the extent of liability is simply an extension of the concept of foreseeable risks required to establish negligence. The determination of negligence can usually be made without detailed inquiry into the nature and extent of specific risks or, for that matter, of the aggregate risks created by an act or omission. However, once the decision is made to limit liability to injury from foreseeable risks, a more complete risk analysis is needed to determine whether an injury was caused by risks defendant could reasonably have foreseen would be created by his negligent conduct.

For the defendant to be liable, neither the precise injury,[29] the particular consequences it produces,[30] nor the exact manner in which

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[26]Johnson v. Meyer's Co., 246 N.C. 310, 98 S.E.2d 315 (1957).

[27]Ennis v. Dupree, 262 N.C. 224, 136 S.E.2d 702 (1964); Lea v. Carolina Power & Light Co., 246 N.C. 287, 98 S.E.2d 9 (1957).

[28]Barefoot v. Joyner, 270 N.C. 388, 154 S.E.2d 543 (1967) (foreseeability is a prerequisite of proximate cause and failure of trial judge to instruct jury on it is reversible error); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966) (same); Pettus v. Sanders, 259 N.C. 211, 130 S.E.2d 330 (1963) (same); McNair v. Richardson, 244 N.C. 65, 92 S.E.2d 459 (1956) (same).

[29]Hart v. Curry, 238 N.C. 448, 78 S.E.2d 170 (1953) (charge that required precise injury to be foreseen held reversible error); Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904) (same).

[30]Green v. Isenhour Brick & Tile Co., 263 N.C. 503, 139 S.E.2d 538 (1965) (that the defendant could foresee the likelihood of a collision is enough); Hudson v. Atlantic Coast Line R.R., 142 N.C. 198, 55 S.E. 103 (1906) (if the defendant can foresee some injury, it does not matter that the injury is more serious or different from what he had reason to suspect).

it occurs[31] must be foreseen. All that is required is that defendant, "in the exercise of the reasonable care of an ordinarily prudent person, should have foreseen that some injury would result from [his] negligence, or that consequences of a generally injurious nature should have been expected."[32] Not all possible consequences that may arise from an act are reasonably foreseeable. However, a result, to be foreseeable, need not be more likely than not to occur.

Beyond these general ideas, little has been done to define foreseeability and the results in the cases add little to its meaning. That an invitee would slip on debris on the floor and fall into a circular saw,[33] that an unknown person would back his car into an improperly secured sign in a parking lot,[34] and that a telephone pole located within six inches of the traveled portion of a street would endanger users of the street[35] have all been held to be beyond the realm of the foreseeable. It is also unforeseeable that a board placed between the rear tire of a car and icy pavement will, upon attempt to move the car, shoot backwards and strike a bystander;[36] that a screw extending from a ladder beneath the surface of the water in a swimming pool will injure a person swimming in the pool;[37] or that the driver of a truck, after moving his truck a few feet from a loading ramp, will be endangered by an open elevator shaft near the ramp.[38] Since the above consequences seem in no way remarkable, cases like these suggest that the range of foreseeability is quite narrow.

This restrictive view of foreseeability, however, is not borne out by other cases in which liability has been imposed for consequences that under existing circumstances seemed much less likely to have been anticipated. It has been held to be foreseeable that severance of a telephone line would cause delay in summoning a physician to attend a woman in childbirth;[39] that a fair patron's foot would be caught in the trial rope

[31]Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964) (defendant turned left while plaintiff was passing him; plaintiff, attempting to avoid collision, lost control of car, came back across highway, and collided with tree); Bondurant v. Mastin, 252 N.C. 190, 113 S.E.2d 292 (1960).

[32]Hamilton v. McCash, 257 N.C. 611, 618-19, 127 S.E.2d 214, 219 (1962). *See also* Hart v. Curry, 238 N.C. 448, 449, 78 S.E.2d 170 (1953).

[33]Deaver v. Deaver, 236 N.C. 186, 72 S.E.2d 225 (1952).

[34]Johnson v. Meyer's Co., 246 N.C. 310, 98 S.E.2d 315 (1957).

[35]Wood v. Carolina Tel. & Tel. Co., 228 N.C. 605, 46 S.E.2d 717 (1948).

[36]Gant v. Gant, 197 N.C. 164, 148 S.E. 34 (1929).

[37]Hiatt v. Ritter, 223 N.C. 262, 25 S.E.2d 756 (1943).

[38]Lee v. Carolina Upholstery Co., 227 N.C. 88, 40 S.E.2d 688 (1946).

[39]Hodges v. Virginia-Carolina Ry., 179 N.C. 566, 103 S.E. 145 (1920).

of a balloon and that he would be carried by the balloon;[40] that a train, after colliding with a car at a crossing, would carry the car seventy-five feet down the tracks where the car would fall on a woman who was working in her flower garden;[41] and that a pregnant lady with poor vision would faint and fall down an open elevator shaft.[42]

Broad generalities to the effect that negligent,[43] intentional,[44] or criminal conduct[45] of others is not foreseeable or that a person has the right to assume that others will obey the law,[46] although frequently resorted to by the court, are likely to be misleading rather than helpful. The idea included in these broadsides may be relevant in a particular case to the determination whether a defendant has been negligent at all[47] and, if so, whether his negligence has contributed to increase the risk of injury to others.[48] Reasonable care does not require that an individual safeguard against every exigency that may occur. A motorist, whose conduct is otherwise reasonable, does not have to anticipate a sudden, head-on confrontation with an oncoming, speeding car.[49] A power company may not be negligent in maintaining uninsulated power lines when the risk of exposure to them is negligible, and no liability attaches when

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[40]Smith v. Cumberland County Agricultural Soc'y, 163 N.C. 346, 79 S.E. 632 (1913).

[41]Watson v. Atlantic Coast Line R.R., 218 N.C. 457, 11 S.E.2d 312 (1940).

[42]McIntyre v. Monarch Elevator & Mach. Co., 230 N.C. 539, 53 S.E.2d 45 (1949).

[43]Moody v. Kersey, 270 N.C. 614, 155 S.E.2d 215 (1967) (stated but not applied); Salter v. Lovick, 257 N.C. 619, 127 S.E.2d 273 (1962) (stated but not applied); Garner v. Pittman, 237 N.C. 328, 75 S.E.2d 111 (1953) (relied upon as one of grounds for decision).

[44]Herring v. Humphrey, 254 N.C. 741, 119 S.E.2d 913 (1961) (unforeseeable that 10-year-old would run unlocked bulldozer into house); Lineberry v. North Carolina Ry., 187 N.C. 786, 123 S.E. 1 (1924) (unforeseeable that boy would push playment into speeding train); Fanning v. J.G. White & Co., 148 N.C. 541, 62 S.E. 734 (1908) (unforeseeable that third party will fire rifle into shanty in which dynamite negligently stored).

[45]Williams v. Mickens, 247 N.C. 262, 100 S.E.2d 511 (1957) (car thief negligently injures plaintiff; criminal act unforeseeable); Ward v. Southern Ry., 206 N.C. 530, 174 S.E. 443 (1934) (plaintiff struck by coal thrown off railway car by thieves; criminal act unforeseeable).

[46]Lucas v. White, 248 N.C. 38, 102 S.E.2d 387 (1958) (right to assume motorist coming from opposite direction will return his car to right lane of travel); Cox v. Hennis Freight Lines, 236 N.C. 72, 72 S.E.2d 25 (1952) (error to deny requested instruction that defendant had right to assume others would obey law); Guthrie v. Gocking, 214 N.C. 513, 199 S.E. 707 (1938) (driver had right to assume that oncoming car would return to right side of road).

[47]*E.g.*, Dolan v. Simpson, 269 N.C. 438, 152 S.E.2d 523 (1967) (another car, without warning, turned suddenly across defendant's lane of travel); Baker v. Smith, 265 N.C. 598, 144 S.E.2d 658 (1965) (another car pulled from obscure private drive into street in front of defendant).

[48]Hout v. Harvell, 270 N.C. 274, 154 S.E.2d 41 (1967) (another car turned in his path so that accident could not have been avoided if defendant had not been speeding); Butner v. Spease, 217 N.C. 82, 6 S.E.2d 808 (1940) (same).

[49]Forgy v. Schwartz, 262 N.C. 185, 136 S.E.2d 668 (1964).

injury occurs because contact is made with them in an unusual or unexpected way.[50] Even when negligence is established, the question whether it created or increased the risk that caused injury remains. Negligence in driving a car at an excessive speed may be found not to have increased the risk of a collision made inevitable when another car turned into its path.[51]

These cases do not support the general rule, sometimes applied by the North Carolina Supreme Court,[52] that misconduct of others is unforeseeable. The intervention of wrongful conduct of others may be the very risk that defendant's conduct creates[53] or, even if it arises independently of defendant's action, may be one against which he is under a duty to safeguard.[54] Beyond this, however, the defendant is required to anticipate the exigencies of human conduct, including the occasional negligence of others.[55] "The mere fact that another is also negligent and

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[50]Pugh v. Tidewater Power Co., 237 N.C. 693, 75 S.E.2d 766 (1953) (metal wire on which kite flown came into contact with uninsulated power lines).

[51]Cases cited note 48 *supra*.

[52]Rowe v. Murphy, 250 N.C. 627, 109 S.E.2d 474 (1959) (unforeseeable that negligent driver will collide with defendant's car negligently parked on highway); Alford v. Washington, 238 N.C. 694, 78 S.E.2d 915 (1953) (unforeseeable that negligent motorist will collide with pole and cause uninsulated wires to fall); Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 11 S.E.2d 326 (1940) (unforeseeable that negligently driven car will have accident because no warning of barricade in street is given).

[53]Riddle v. Artis, 243 N.C. 668, 91 S.E.2d 894 (1956) (defendant's negligence stranded plaintiff's car in highway); Gold v. Kiker, 216 N.C. 511, 5 S.E.2d 548 (1939) (failure to warn that road was four feet wider than bridge into which it fed); White v. Carolina Realty Co., 182 N.C. 536, 109 S.E. 564 (1921) (oncoming car collided with defendant's truck negligently parked on highway); Lee v. Atlantic Coast Line R.R., 176 N.C. 95, 97 S.E. 158 (1918) (drunken passenger, ejected by defendant, walked into side of train); Woods v. North Carolina Pub.-Serv. Corp., 174 N.C. 697, 94 S.E. 459 (1917) (carrier negligently caused passenger to alight so as to be exposed to passing traffic); Penny v. Atlantic Coast Line R.R., 133 N.C. 221, 45 S.E. 563 (1903) (railroad failed to warn of danger created by shoot-out between passengers).

[54]Moody v. Kersey, 270 N.C. 614, 155 S.E.2d 215 (1967) (defendant on notice to use care when assisted by a known inexperienced person); Penyan v. Settle, 263 N.C. 578, 139 S.E.2d 863 (1965) (two-year-old, left alone in car, turned ignition switch); Benton v. North Carolina Pub.-Serv. Corp., 165 N.C. 354, 81 S.E. 448 (1914) (twelve-year-old climbed tree in populous residential area and came into contact with defendant's uninsulated electric wires); Stanley v. Southern Ry., 160 N.C. 323, 76 S.E. 221 (1912) (railroad provided insufficient personnel to control drunk and rowdy passengers).

[55]Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966) (defendant must anticipate exigencies of traffic); Salter v. Lovick, 257 N.C. 619, 127 S.E.2d 273 (1962) (if defendant by keeping proper lookout could have discovered unlighted car, he is liable); Hamilton v. McCash, 257 N.C. 611, 619, 127 S.E.2d 214, 219 (1962) (motorist tailgating truck struck child when truck turned to avoid him; motorist "should have foreseen that some injury would result from her negligence"); Davis v. Jessup, 257 N.C. 215, 220, 125 S.E.2d 440, 443-44 (1962) (oncoming car

the negligence of the two results in injury to plaintiff does not relieve either."[56] And when an individual is aware of the negligence of others, he may be required "to take all the more care to avoid" injury.[57]

How far the foreseeability rule goes to limit liability for negligent conduct is uncertain. If defendant's conduct creates unreasonable risks of harm to one person, is he liable to another to whom no danger was foreseeably threatened? When danger to property only is foreseeable, will liability be imposed for unforeseeable personal injury? Is the defendant, whose conduct creates risks of slight harm, to be held responsible for disastrous consequences that in fact result? If the risk that causes injury is one created by defendant's conduct, does liability attach when the possibility that it would materialize is negligible? For the most part, these questions have not received much attention from courts.

The decision in which the most extensive exploration of the problem has been made is Cardozo's opinion in the classic case of *Palsgraf v. Long Island Railroad Co.*[58] The defendant in assisting a passenger to board a moving train, dislodged a package he was carrying. When the package fell to the ground, the fireworks it contained exploded, and the concussion overturned a pair of scales some distance away. The scales fell upon and injured the plaintiff. Defendant's negligence involved foreseeable risks of harm to the package and perhaps to the passenger; but, as he had no knowledge of the contents of the package, no risk of injury to the plaintiff could be foreseen. The majority of the court in denying recovery, held that defendant's conduct was not negligent toward the plaintiff.

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turned left in front of speeding defendant; defendant "could have reasonably foreseen and expected that the driver of one of the several cars approaching the same intersection . . . might turn left"); Bryant v. Woodlief, 252 N.C. 488, 493, 114 S.E.2d 241, 245 (1960) (oncoming car turned in front of speeding defendant; "it cannot be said as a matter of law that the defendant . . . could not reasonably have foreseen that some accident or injury was likely to occur as a result of his excessive speed").

[56]Green v. Isenhour Brick & Tile Co., 263 N.C. 503, 506, 139 S.E.2d 538, 540-41 (1964); *accord*, Earwood v. Southern Ry., 192 N.C. 27, 133 S.E. 180 (1926) (crossing accident; concurring negligence of railroad and motorist); Turner v. Turner, 261 N.C. 472, 474-75, 135 S.E.2d 12, 14 (1964): "After all, two vehicles slammed into each other in the intersection in broad daylight, injuring the passenger in one of them. One driver may have been more or less negligent than the other, but the law does not measure negligence on a percentage basis in cases of this nature. . . . Each defendant is civilly responsible if some negligent act of his, combined with the negligent act of the other, produces the harmful result."

[57]McNair v. Goodwin, 264 N.C. 146, 148, 141 S.E.2d 22, 23 (1965); *accord*, Gregory v. Lynch, 271 N.C. 198, 155 S.E.2d 488 (1967) (speeder failed to slow down after seeing oncoming car begin left turn in front of him); Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952) (same).

[58]248 N.Y. 339, 162 N.E. 99 (1928).

The majority opinion, written by Justice Cardozo, held that the defendant's duty was limited by the risks to be perceived from his conduct and suggested other restrictions upon defendant's liability that this limitation of duty might entail. A distinction might "be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, *e.g.*, one of bodily security. Perhaps other distinctions may be necessary."[59]

The *Palsgraf* case has probably been more popular than influential in judicial circles.[60] Its practical impact has been in cases involving "unforeseeable" plaintiffs, and in this situation its reception by courts has been divided.[61] The North Carolina Supreme Court apparently has not utilized the "duty" rationale of *Palsgraf*. "Unforeseeable" plaintiff cases have been decided under proximate cause, and the results have been mixed. Recovery has been denied when a person, hit by defendant's car, was propelled twenty-five feet through the air and struck the plaintiff;[62] when a sapling, pushed with other debris by defendant's bulldozer, flew out and struck plaintiff who was standing some distance away;[63] and even when a truck driver, after moving his truck a few feet away from a loading platform, slipped and fell backwards into an open elevator shaft at the platform.[64] Liability has been imposed when a train, after colliding with a car at a crossing, carried the car seventy-four feet down the tracks where the car fell on a woman who was working in her flower garden;[65] it has been imposed when a negligently shunted railway car left the spur track, knocked down an electric line pole, and caused electric current to be transmitted over the lines into a laundry some distance away;[66] and it has been imposed when a fire spread from a railroad right

[59]*Id.* at 347, 162 N.E. at 101.

[60]*See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43, 254-60 (4th ed. 1971).

[61]*Id.*

[62]Boone v. North Carolina R.R., 240 N.C. 152, 81 S.E.2d 380 (1954); *see* Hudson v. Atlantic Coast Line R.R., 142 N.C. 198, 55 S.E. 103 (1906) (railroad car got loose through defendant's negligence, rolled some distance, and crashed into other cars, which in turn struck plaintiff who was crossing tracks).

[63]Griffin v. Blankenship, 248 N.C. 81, 102 S.E.2d 451 (1958).

[64]Lee v. Carolina Upholstery Co., 227 N.C. 88, 40 S.E.2d 688 (1946).

[65]Watson v. Atlantic Coast Line R.R., 218 N.C. 457, 11 S.E.2d 312 (1940).

[66]Ramsey v. Carolina-Tennessee Power Co., 195 N.C. 788, 143 S.E. 861 (1928).

of way through an uncultivated field to the plaintiff's house where it kindled a hen's nest, which set fire to the house.[67]

The observation in *Palsgraf* that it might be appropriate to impose liability for harm only to those interests and in the magnitude defendant's conduct foreseeably threatened has not received significant support from the courts.[68] A number of decisions—mostly older ones—are contrary to it.[69] The sequel[70] to the famous *Wagon Mound* case,[71] which established the foreseeability rule in English negligence law, probably reflects a reluctance to accept the idea that other courts may share. Defendant, who negligently allowed furnace oil to overflow into the harbor where it spread over the surface of the water, was held liable for damage to ships in the harbor when the oil ignited. Although the foreseeable risk that the oil would ignite was only very light, the court found no justification for defendant to ignore even that slight risk and imposed liability. Further, the idea may have more theoretical appeal than practical significance as fact situations to which it would apply seem to have occurred only infrequently. No North Carolina case in which the facts raised this problem could be found.[72]

Some exceptions to the foreseeability rule are well established. Defendant is held liable for consequences, whether or not they are foreseeable, when his negligent conduct causes a foreseeable impact upon the person of another.[73] The tortfeasor is said to take his victim as he finds him and is liable for unforeseeable injuries that result because of a preexisting physical[74] or mental[75] condition. He is liable for unusual

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[67]Gainey v. Rockingham R.R., 235 N.C. 114, 68 S.E.2d 780 (1952).

[68]W. PROSSER, *supra* note 60, § 43, at 259-60.

[69]*See* cases cited notes 74-75 *infra*; W. PROSSER, *supra* note 60, § 43, at 259.

[70]Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co., [1967] 1 A.C. 617 (1967) (P.C. 1966) (N.S.W.).

[71]Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co., [1961] A.C. 388 (P.C. 1961) (N.S.W.).

[72]The North Carolina Supreme Court has adopted the view that it is sufficient that defendant could foresee some injury or consequences of a generally injurious nature. *See* cases cited notes 29-32 *supra*. It has also stated that when defendant could have foreseen some injury, he is not relieved of liability if the injury that results is more serious than or different from the injury he could foresee. Hudson v. Atlantic Coast Line R.R., 142 N.C. 198, 55 S.E. 103 (1906).

[73]Potts v. Howser, 274 N.C. 49, 161 S.E.2d 737 (1968); Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964).

[74]Potts v. Howser, 274 N.C. 49, 161 S.E.2d 737 (1968).

[75]Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964). *See also* Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960).

consequences,[76] including death,[77] that result from the injuries his negligence causes. Extended liability has been imposed for unforeseeable emotional harm as well as unforeseeable physical harm.[78]

Liability is imposed only for aggravation of the preexisting condition since defendant's negligence is not a cause of the condition that already existed.[79] However, if defendant's negligence operates to precipitate a dormant preexisting condition, he is liable for all the harm that results.[80] The distinction between a preexisting disease or impairment that is already in active operation and one that is latent is largely a practical one. In case of the former, discrimination between the existing injury and the additional injury defendant's negligence has caused is possible. In case of the latent condition, the chance that plaintiff's peculiar susceptibility to harm would someday have precipitated injury anyway—a fact that arguably should make defendant liable only for acceleration of the occurrence of the harm—is difficult of proof and inevitably involves some speculation.[81]

Liability beyond foreseeable risks of conduct is generally stated to exist for intentional torts.[82] The imposition of extended liability is probably in part a carry-over from earlier law and in part a willingness to impose greater responsibility when conduct is intended. Although defendant's liability may still be cut off short of all the consequences his conduct has caused, foreseeability plays a less important part in this determination.

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[76]Apel v. Queen City Coach Co., 267 N.C. 25, 147 S.E.2d 566 (1966).

[77]Meekins v. Railway Co., 134 N.C. 217, 46 S.E. 493 (1904); Gray v. Little, 126 N.C. 385, 35 S.E. 611 (1900).

[78]Potts v. Howser, 274 N.C. 49, 161 S.E.2d 737 (1968); Meekins v. Railway Co., 134 N.C. 217, 46 S.E. 493 (1904).

[79]Potts v. Howser, 274 N.C. 49, 54, 161 S.E.2d 737, 742 (1968) (dictum).

[80]Apel v. Queen City Coach Co., 267 N.C. 25, 147 S.E.2d 566 (1966); Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964).

[81]The suggestion has been made that the possibility that the injured person's predisposition would have eventually precipitated injury should be taken into account in determining the amount of the defendant's liability. Byrd & Dobbs, *Torts, Survey of North Carolina Case Law*, 43 N.C.L. REV. 906, 926 (1965).

[82]Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940) (trespasser liable for harm although it occurred without his fault and could not be anticipated by him); Clark v. Whitehurst, 171 N.C. 1, 86 S.E. 78 (1915) (defendant who wrongfully took possession of mule liable for its value although he was not at fault in causing mule's death); Bear v. Harris, 118 N.C. 476, 24 S.E. 364 (1896) (defendant who moved schooner without permission liable for its value when it was destroyed by storm); Bridgers v. Dill, 97 N.C. 222, 1 S.E. 767 (1887) (defendant who tore down fence liable for damage to crops by livestock); Martin v. Cuthbertson, 64 N.C. 328 (1870) (defendant who rode horse for greater distance and longer time than authorized liable for its death without his fault).

Some[83] North Carolina decisions indicate that the breach of a statutory duty constitutes a separate tort[84] and suggest that a defendant, who has violated a safety statute, should be liable for consequences beyond those for which compensation can be recovered in a negligence action.[85] However, the concept of more extensive liability for breach of statutory duty never gained a significant foothold and now seems to have been abandoned altogether.[86] The court's later response to the idea of extended liability is indicated in *Aldridge v. Hasty*:[87]

> Strictly speaking, a violation of a criminal statute constitutes a positive, affirmative tort which perhaps should never have been put in the category of negligence. It would seem that this view prevails in some jurisdictions where it is held that foreseeability is not a condition of liability. In these jurisdictions the rule that the tort-feasor is liable for any consequence that may flow from his unlawful act as the natural and probable (or proximate) result thereof, whether he could foresee or anticipate it or not, prevails. It is presumed that he intended whatever resulted from his unlawful act. . . .
>
> In the past this rule has received the sanction of this Court by direct decision as well as by way of *obiter dicta*. . . .
>
> But the trend of our decisions since the advent of the automobile has been to treat the breach of a criminal law as an act of negligence *per se* unless otherwise provided in the statute. . . .
>
> When the action is for damages resulting from the violation of a

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[83]This paragraph is taken from another article by the writer: Byrd, *Proof of Negligence in North Carolina—Part II. Similar Occurrences and Violation of Statute*, 48 N.C.L. REV. 731, 744-45 (1970).

[84]*E.g.*, Stone v. Texas Co., 180 N.C. 546, 553-54, 105 S.E. 425, 429 (1920): "While it may not be strictly accurate to speak of the breach of a duty arising out of a violation of a statutory duty as negligence . . . it is generally so treated. . . . For practical purposes, it may properly be a convenient mode of administering the right, because it involves the question of proximate cause and contributory negligence. . . . [W]hen there is a violation of a statute or ordinance, especially one . . . which so deeply concerns public and individual safety, both as to person and property, it is an illegal act, which, of itself, is a tort, without reference to the question of negligence. . . ."

[85]Holderfield v. Rummage Bros. Trucking Co., 232 N.C. 623, 61 S.E.2d 904 (1950); Dickey v. Atlantic Coast Line R.R., 196 N.C. 726, 147 S.E. 15 (1929); Hodges v. Virginia-Carolina Ry., 179 N.C. 566, 103 S.E. 145 (1920); Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904).

[86]Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966) (charge that permitted recovery upon finding that statutory violation was actual cause of injury held erroneous); McNair v. Richardson, 244 N.C. 65, 92 S.E.2d 459 (1956) (charge that foreseeability was unnecessary if defendant's act was unlawful held erroneous); Woods v. Freeman, 213 N.C. 314, 195 S.E. 812 (1938) (omission of proximate cause in charge held erroneous).

[87]240 N.C. 353, 82 S.E.2d 331 (1954).

> [statute], does the doctrine of foreseeability apply? We are constrained to answer in the affirmative.[88]

Assessment of the value of the foreseeability rule is difficult. While the decisions in a large number of scope-of-liability cases are consistent with it, this result may be more an incident of the fact that in the bulk of cases the scope-of-liability issue presents no difficult problem than a consequence produced by application of the foreseeability rule. Whatever basic rule a court followed, the outcome in most of these cases would likely be the same.

The crucial question then is how workable in the hard case is a rule that attempts to limit liability to fault? Concepts such as foreseeability and scope of risks through which this policy is implemented are at best imprecise. To give them content in a particular fact situation without resorting to the judgment whether defendant should be responsible for the injury his conduct has caused is difficult. Yet this judgment is the very one for which they are supposed to give guidance. Professor Morris has properly pointed out that they are subject to manipulation by the generality or detail in which a fact situation is described.[89] Recognition of this possibility aids the attorney in presenting his argument and permits the court to avoid obvious pitfalls but provides little help in determining where between these extremes an appropriate description of the facts lies. Again, it is difficult to prevent the judgment about where legal responsibility should be placed from being a major factor in this determination.

Despite the difficulty of its application, the risk rule is helpful because it provides a general standard under which scope-of-liability problems can be decided. However, its appeal is deceptive and can easily cause the basic objective it seeks—allocation of loss between an injured person and the tortfeasor—to be submerged in the pursuit of its logic. When a tortfeasor's conduct has created danger which causes injury to another through a series of bizarre happenings, it may be easy enough to say that these happenings were unforeseeable. It is not so clear, however, that this conclusion requires that the tortfeasor escape liability and that the injured person be left to bear the loss. The foreseeability rule can readily be overextended in this type of case. If a foreseeable risk of injury is created by defendant's conduct but the circumstances

[88] *Id.* at 358-59, 82 S.E.2d at 337-38.

[89] C. MORRIS, MORRIS ON TORTS 176-77 (1953).

leave doubt concerning whether defendant should be liable, an excessively refined risk analysis amounts to little more than an arbitrary and intellectually deceptive way of resolving that doubt. A better approach may be to recognize that other factors should also be considered in these instances. For example, in allocating the loss between the parties in such a case, the existence of culpability on the part of one of them and the extent of his culpability may legitimately be considered. Finally, the broad philosophical premise at the foundation of the policy of limitation of liability may itself be significant. Results may depend upon whether the limitation is viewed as a protection of the tortfeasor to be strictly enforced or a restriction upon the injured person's right of recovery to be imposed only when good reason for its imposition exists.

INTERVENING CAUSES

In a large number of cases the determination of the extent of a tortfeasor's liability is influenced by the time sequence in which two or more events occurred. The typical situation is one in which a third person or agency intervenes between defendant's conduct and plaintiff's injury and contributes to cause the injury. This situation and the legal problem that arises out of it are usually described by the phrase "intervening cause." A force or event that comes into existence after the defendant has acted is an intervening cause;[90] one already in operation at the time of the defendant's negligent act is not.[91] This distinction, easy enough to state, is sometimes difficult to apply. The negligence of a motorist who runs into an obstruction left in the street by defendant, although it comes into operation after the obstruction is created, should not be considered an intervening cause if the defendant has negligently failed to warn of the existence of the obstruction.[92] To project the events which led to a collision between two moving vehicles so as to say that the negligence of one driver was prior in time, while perhaps possible, does not seem meaningful to the determination of legal liability.[93]

[90]Illustrative fact situations may be found in Nance v. Parks, 266 N.C. 206, 146 S.E.2d 24 (1966); Toone v. Adams, 262 N.C. 403, 137 S.E.2d 132 (1964).

[91]Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Riddle v. Artis, 243 N.C. 668, 91 S.E.2d 894 (1956).

[92]Several North Carolina cases have held the negligence of the motorist to be an intervening cause that insulated the negligence of the person who created the obstruction. *E.g.*, Montgomery v. Blades, 222 N.C. 463, 23 S.E.2d 844 (1942); Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 11 S.E.2d 326 (1940); Beach v. Patton, 208 N.C. 134, 179 S.E. 446 (1935).

[93]A number of North Carolina cases have held the negligence of the operator of one of the

Although earlier decisions of the North Carolina Supreme Court indicated that intervening acts had to be gross and palpable to relieve a defendant of liability,[94] it now seems well-settled that foreseeability is the principle applied by the court to determine the extent of defendant's liability in these cases as well as in cases in which no intervening cause is involved.[95] Defendant must take into account matters within the realm of common knowledge and is to be held liable when the intervening cause is a part of the risk he has created.[96] When a car skids on slippery pavement,[97] loose gravel on the highway is kicked up by passing cars,[98] a rotten porch rail collapses from the weight of a person leaning on it,[99] defendant's conduct is unreasonable because of the possibility that the very thing that happened would occur. If the defendant's conduct helps to precipitate the intervening event, it is reasonably regarded as a part of the risk of his conduct for which he should be held liable.[100] The risk of an obstruction or ditch in the street is that another driver will run his car into it.[101] That a drunken passenger, ejected from a train, will walk into the side of it[102] and that a passenger caused by a carrier to alight into traffic will be struck by a passing car[103] are the very consequences risked by the defendant's unreasonable conduct.

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vehicles to be an intervening cause. *E.g.*, Hudson v. Petroleum Transit Co., 250 N.C. 435, 108 S.E.2d 900 (1959) (intersectional collision of two cars); Troxler v. Central Motor Lines, Inc., 240 N.C. 420, 82 S.E.2d 342 (1954) (inttersectional collision); Jones v. Atlantic Coast Line R.R., 235 N.C. 640, 70 S.E.2d 669 (1952) (railroad crossing collision).

[94]Riggs v. Akers Motor Lines, Inc., 233 N.C. 160, 63 S.E.2d 197 (1950); Williams v. Charles Stores Co., 209 N.C. 591, 184 S.E. 496 (1936). Cases that rejected this view also existed. Rattley v. Powell, 223 N.C. 134, 25 S.E.2d 448 (1943) (error to instruct that intervening negligence, to insulate, must be palpable and gross); Quinn v. Atlantic & Y. Ry., 213 N.C. 48, 195 S.E. 85 (1937) (same).

[95]*E.g.*, Davis v. Jessup, 257 N.C. 215, 125 S.E.2d 440 (1962); Watters v. Parrish, 252 N.C. 787, 115 S.E.2d 1 (1960); Bryant v. Woodlief, 252 N.C. 488, 114 S.E.2d 241 (1960).

[96]Cole v. Atlantic Coast Line R.R., 211 N.C. 591, 191 S.E. 353 (1937) (redcap directed passenger to train after starting signal given; passenger injured when train started as he attempted to board).

[97]Karpf v. Adams, 237 N.C. 106, 74 S.E.2d 325 (1952).

[98]Stewart v. Atlantic Coast Line R.R., 202 N.C. 288, 162 S.E. 547 (1932).

[99]Young v. Barrier, 268 N.C. 406, 150 S.E.2d 734 (1966).

[100]Nance v. Parks, 266 N.C. 206, 146 S.E.2d 24 (1965) (driver left motor of car running; mechanic, unaware motor was running, accidentally depressed accelerator while working in floorboard); Harvell v. City of Wilmington, 214 N.C. 608, 200 S.E. 367 (1938) (drunk driver runs through deceptive dead-end street).

[101]Green v. Isenhour Brick & Tile Co., 263 N.C. 503, 139 S.E.2d 538 (1964); Price v. City of Monroe, 234 N.C. 666, 68 S.E.2d 283 (1951); Sample v. Spencer, 222 N.C. 580, 24 S.E.2d 241 (1943).

[102]Lee v. Atlantic Coast Line R.R., 176 N.C. 95, 97 S.E. 158 (1918).

[103]Wood v. North Carolina Pub.-Serv. Corp., 174 N.C. 697, 94 S.E. 459 (1917).

Equally good reasons exist to hold the defendant liable when at the time he acts he is on notice of circumstances that make the intervention of others likely.[104] Under this view defendant was held liable for an explosion caused when a lighted cigar came into contact with gasoline vapors vented by him into an area where he knew others customarily smoked.[105] Similarly, a railroad that knew that mail bags were regularly thrown from passing trains by employees of the government was held liable to a passenger on the waiting platform who was struck by one of them.[106] And responsibility for assault upon a passenger was placed upon a carrier that had failed to control a drunk and rowdy group of passengers or had reason to anticipate an assault by some passengers upon others.[107]

A reasonable person is also required to anticipate the intermeddling of children,[108] the customary reactions of animals,[109] weather conditions that are not abnormal or unusual,[110] the exigencies of traffic,[111] and the occasional negligence of others.[112] The curious and immature interventions of children can be foreseen and, when they occur, are not to be considered superseding causes.[113] For this reason liability has been im-

[104]Moody v. Kersey, 270 N.C. 614, 155 S.E.2d 215 (1967) (defendant on notice to use care when assisted by person known to be inexperienced); Murchison v. Powell, 269 N.C. 656, 153 S.E.2d 352 (1967) (defendant on notice that horse will be frightened by sound of passing car).

[105]Rushing v. Texas Co., 199 N.C. 173, 154 S.E. 1 (1930).

[106]Thomas v. Southern Ry., 173 N.C. 494, 92 S.E. 321 (1917).

[107]Stanley v. Southern Ry., 160 N.C. 323, 76 S.E. 221 (1912); Penny v. Atlantic Coast Line R.R., 133 N.C. 221, 45 S.E. 563 (1903); Britton v. Atlanta & C. Air-Line Ry., 88 N.C. 536 (1883).

[108]Campbell v. Model Steam Laundry, 190 N.C. 649, 130 S.E. 638 (1925); Barnett v. Cliffside Mills, 167 N.C. 576, 83 S.E. 826 (1914). A strict view of the foreseeability of intervening intentional acts of children is sometimes taken by the court. Herring v. Humphrey, 254 N.C. 741, 119 S.E.2d 913 (1961) (unforeseeable that 10-year-old would run unlocked bulldozer into a house); Lineberry v. North Carolina Ry., 187 N.C. 786, 123 S.E. 1 (1924) (unforeseeable that plaintiff would be pushed into speeding train by playmate).

[109]Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Murchison v. Powell, 269 N.C. 656, 153 S.E.2d 352 (1967); Wells v. Johnson, 269 N.C. 622, 153 S.E.2d 2 (1967).

[110]Olan Mills, Inc. v. Cannon Aircraft Executive Terminal, Inc., 273 N.C. 519, 160 S.E.2d 735 (1968) (strong wind); Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925) (occasional lightning).

[111]Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966); Hamilton v. McCash, 257 N.C. 611, 127 S.E.2d 214 (1962); Bryant v. Woodlief, 252 N.C. 488, 114 S.E.2d 241 (1960).

[112]Graham v. Winson Coca-Cola Bottling Co., 257 N.C. 188, 125 S.E.2d 429 (1962) (that customer may negligently knock defective bottle off display rack); Shepard v. Rheem Mfg. Co., 251 N.C. 751, 112 S.E.2d 380 (1960) (contractor's negligent installation of defective hot water heater supplied by defendant); Yandell v. National Fireproofing Corp., 239 N.C. 1, 79 S.E.2d 223 (1953) (carrier's failure to discover defective car negligently loaded by shipper).

[113]Cases cited notes 108 *supra* & 114-16 *infra*.

posed when a two-year-old child, left alone in a car, turned the ignition switch and started the car to roll,[114] when a seven-year-old child removed dynamite caps from the place where they were negligently stored and exposed them to fire,[115] and when a twelve-year-old boy climbed a tree on a populous residential street and came into contact with uninsulated electrical wires.[116] Weather conditions, unless highly unusual and extraordinary,[117] must be anticipated and their intervention, whether defendant's negligence is simply a failure to safeguard against them[118] or exists independently of their occurrence,[119] will not relieve him of liability. Only those highly unusual occurrences that are termed acts of God are held to be unforeseeable,[120] and even when they intervene the defendant is held liable if his negligence combines with them to cause harm.[121]

The observation that the occasional negligence of others is foreseeable is frequently made.[122] Many cases, in accord with this view, hold a wrongdoer liable when an intervening negligent act combines with his own negligence to cause injury.[123] In a substantial number of cases, however, defendant has not been held liable on the grounds that the intervening misconduct was unforeseeable.[124] The decisions, viewed from the standpoint of what can reasonably be foreseen, are irreconcilable. When a carrier caused a passenger to alight into the street, it was

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[114]Pinyan v. Settle, 263 N.C. 578, 139 S.E.2d 863 (1965).

[115]Krachanake v. Acme Mfg. Co., 175 N.C. 435, 95 S.E. 851 (1918).

[116]Benton v. North Carolina Pub.-Serv. Corp., 165 N.C. 354, 81 S.E. 448 (1914).

[117]Olan Mills, Inc. v. Cannon Aircraft Executive Terminal, Inc., 273 N.C. 519, 160 S.E.2d 735 (1968); Bennett v. Southern Ry., 245 N.C. 261, 96 S.E.2d 31 (1957); Averitt v. Murrell, 49 N.C. 323 (1857).

[118]Lynch v. Carolina Tel. & Tel. Co., 204 N.C. 252, 167 S.E. 847 (1933); Ridge v. Norfolk S.R.R., 167 N.C. 510, 83 S.E. 762 (1914).

[119]Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925); Gibbon v. Lamm, 183 N.C. 421, 111 S.E. 618 (1922).

[120]Olan Mills, Inc. v. Cannon Aircraft Executive Terminal, Inc., 273 N.C. 519, 525, 160 S.E.2d 735, 741 (1968) (only "events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them" constitutes acts of God).

[121]Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925); Pickens County v. Jennings, 181 N.C. 393, 107 S.E. 312 (1921); Harris v. Norfolk S.R.R., 173 N.C. 110, 91 S.E. 710 (1917).

[122]*E.g.*, Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1965); Davis v. Jessup, 257 N.C. 215, 125 S.E.2d 440 (1962).

[123]Turner v. Turner, 261 N.C. 472, 135 S.E.2d 12 (1964); Stockwell v. Brown, 254 N.C. 662, 119 S.E.2d 795 (1961); Earwood v. Southern Ry., 192 N.C. 27, 133 S.E. 180 (1926).

[124]*E.g.*, Garner v. Pittman, 237 N.C. 328, 75 S.E.2d 111 (1953); Reeves v. Staley, 220 N.C. 573, 18 S.E.2d 239 (1942); Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 11 S.E.2d 326 (1940).

held to be foreseeable that he would be struck by a passing car;[125] but when a pedestrian was forced to walk into the street because the sidewalk was blocked, it was held unforeseeable that he would be negligently run down by a motorist.[126] The negligence of a motorist who runs his car into an obstruction in the highway negligently created by the defendant has been held in some cases to be foreseeable[127] and in others to be unforeseeable.[128]

One difficulty encountered in the North Carolina cases is that the court uses the foreseeability concept as a vehicle to decide a number of separate issues. In a number of cases in which intervening negligent conduct was held to be unforeseeable, it seems fairly clear that the basis for the decision was that under the circumstances, even if the other's negligence was foreseeable, defendant owed no duty to the plaintiff in regard to it.[129] To anticipate that a drunken passenger, ejected from a bus, may be struck by a negligently driven car as he stumbles about the streets entails no great strain upon the concept of foresight. However, the determination of how far the carrier's responsibility for him should extend, if at all, beyond seeing that he has alighted from the bus in a safe place may provide a reasonable basis to deny its liability.[130]

In still other cases the facts simply failed to establish any unreasonable conduct of the defendant.[131] In relation to the issue of negligence, the statement that a person, unless existing circumstances put him on notice, does not have to foresee the negligence of others is sensible. A motorist who is operating his car on the highway in a reasonable manner does not have to anticipate that an oncoming car will suddenly pull into

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[125]Wood v. North Carolina Pub.-Serv. Corp., 174 N.C. 697, 94 S.E. 459 (1917).

[126]Newell v. Darnell, 209 N.C. 254, 183 S.E. 374 (1936).

[127]Green v. Isenhour Brick & Tile Co., 263 N.C. 503, 139 S.E.2d 538 (1965); Price v. City of Monroe, 234 N.C. 666, 68 S.E.2d 283 (1951).

[128]*See* cases cited note 92 *supra*.

[129]Toone v. Adams, 262 N.C. 403, 137 S.E.2d 132 (1964) (unsportsmanlike conduct toward umpire by baseball manager; umpire assaulted by fans); State *ex rel.* Garland v. Gatewood, 241 N.C. 606, 86 S.E.2d 195 (1955) (drunk, negligently permitted by sheriff to escape, killed on railroad tracks); Ellis v. Sinclair Ref. Co., 214 N.C. 388, 199 S.E. 403 (1938) (customer killed when inflammable oil ignited somehow when he slammed door; probably outside area open to public); Ballinger v. Rader, 151 N.C. 383, 66 S.E. 314 (1909) (girl killed by negligently discharged inmate of insane asylum).

[130]Shaw v. Barnard, 229 N.C. 713, 51 S.E.2d 295 (1949); Roseman v. Carolina Cent. R.R., 112 N.C. 709, 16 S.E. 766 (1893).

[131]White v. Cason, 251 N.C. 646, 111 S.E.2d 887 (1960); Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 86 S.E.2d 780 (1955); Clark v. Lambreth, 235 N.C. 578, 70 S.E.2d 828 (1952).

his lane of travel,[132] that a car he is meeting will without warning turn left across his path of travel,[133] or that another motorist will drive from the roadside into the highway in front of him.[134]

However, the issue whether conduct entails unreasonable risks at all, which is the relevant one in the above cases, and the issue whether a person is to be held liable for injury caused by unreasonable risks created by his conduct involve substantially different considerations. In the latter instance negligence, such as excessive speed or failure to keep a proper lookout, exists without regard to the intervening conduct, and a principal risk of the speed or improper lookout is that the negligently operated vehicle will be involved in an accident. That there are negligent drivers on the highways and that their presence increases the danger of defendant's own negligent driving seem to be obvious factors that he should be required to take into account. In this context, the conclusion that defendant could foresee the specific negligent act of a particular person is not essential either to establish his negligence or to identify the collision as a risk of his conduct. On the other hand, the conclusion that defendant could not foresee specific negligence of another person seems equally unimportant in the determination of his liability.

In yet another group of cases in which intervening misconduct has been held to be unforeseeable, defendant's conduct has not increased the risk of injury to the plaintiff.[135] The accident in which injury was sustained would have occurred had defendant not been negligent. When the driver of another car makes a sudden left turn in front of defendant's car,[136] or pulls from an obscure private drive[137] or servient road[138] into defendant's path of travel, a collision is made inevitable and defendant's excessive speed does not increase the risk of its occurrence. In this situation the foreseeability of the intervening negligence is important to the determination of the defendant's liability. If he had reason to foresee the other person's negligence, his conduct has contributed to the risk

[132]Forgy v. Schwartz, 262 N.C. 185, 136 S.E.2d 668 (1964).

[133]Dolan v. Simpson, 269 N.C. 438, 152 S.E.2d 523 (1967).

[134]Baker v. Smith, 265 N.C. 598, 144 S.E.2d 658 (1965) (per curiam).

[135]Capps v. Smith, 263 N.C. 120, 139 S.E.2d 19 (1964) (per curiam); Loving v. Whitton, 241 N.C. 273, 84 S.E.2d 919 (1954).

[136]Hout v. Harvell, 270 N.C. 274, 154 S.E.2d 41 (1967); Butner v. Spease, 217 N.C. 82, 6 S.E.2d 808 (1940).

[137]Garner v. Pittman, 237 N.C. 328, 75 S.E.2d 111 (1953).

[138]Reeves v. Staley, 220 N.C. 573, 18 S.E.2d 239 (1942).

and he will be held liable.[139] Surrounding circumstances may indicate that the intervening acts could have been anticipated,[140] but if they do not, the specific negligence of the intervenor will be held unforeseeable.

In some circumstances defendant may be liable even though an accident would have happened without his negligence. If, for example, in an automobile accident defendant's speed, although it does not increase the risk of the initial collision, causes him to lose control of his car or causes it to travel away from the scene of the collision so that a second accident occurs, defendant is held liable for injury caused by the second impact.[141] His speed has been a major factor in causing the second accident.

Finally, unforeseeability of intervening misconduct is the stated reason for holding the defendant not liable in some cases in which the real basis for decision seems to be policy.[142] These cases probably reflect a judgment that under the circumstances a wrongdoer other than the defendant should be held responsible rather than a determination that the risk causing injury is outside the scope of defendant's conduct. This conclusion is evident in much of the terminology used by the court. Defendant is not to be held liable because "the injury . . . was independently and proximately produced by the wrongful act . . . of an outside agency or responsible third person,"[143] because the intervening misconduct was the "real, efficient" cause[144] or the "sole proximate cause"[145] of the injury, because the defendant's negligence was "passive,"[146] or

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[139]*See* Streater v. Marks, 267 N.C. 32, 147 S.E.2d 529 (1966); King v. Powell, 252 N.C. 506, 114 S.E.2d 265 (1960); Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952).

[140]*See* Gregory v. Lynch, 271 N.C. 198, 155 S.E.2d 488 (1967); Marshburn v. Patterson, 241 N.C. 441, 85 S.E.2d 683 (1955).

[141]Jones v. Horton, 264 N.C. 549, 142 S.E.2d 351 (1965); Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954).

[142]*See* cases cited notes 158-63 *infra*.

[143]Philyaw v. City of Kinston, 246 N.C. 534, 537, 98 S.E.2d 791, 793 (1957); McLaney v. Anchor Motor Freight, Inc., 236 N.C. 714, 718, 74 S.E.2d 36, 38 (1953); *accord, e.g.*, Potter v. Frosty Morn Meats, Inc., 242 N.C. 67, 70, 86 S.E.2d 780, 782 (1955); Godwin v. Nixon, 236 N.C. 632, 642, 74 S.E.2d 24, 30 (1953).

[144]*E.g.*, Owens v. Norfolk & W. Ry., 258 N.C. 92, 95, 128 S.E.2d 4, 6 (1962) (per curiam); Rowe v. Murphy, 250 N.C. 627, 633, 109 S.E.2d 474, 479 (1959); Clark v. Lambreth, 235 N.C. 578, 585, 70 S.E.2d 828, 832 (1952).

[145]Basnight v. Wilson, 245 N.C. 548, 553, 96 S.E.2d 699, 703 (1957); Quinn v. Atlantic & Y. Ry., 213 N.C. 48, 50, 195 S.E. 85, 87 (1938); *accord, e.g.*, Troxler v. Central Motor Lines, Inc., 240 N.C. 420, 82 S.E.2d 342 (1954).

[146]White v. Cason, 251 N.C. 646, 649-50, 111 S.E.2d 887, 890 (1960); Montgomery v. Blades, 222 N.C. 463, 469, 23 S.E.2d 844, 849 (1943).

because the defendant's negligence "would have resulted in no injury but for the negligent act of"[147] the intervenor.

The "but for" rationale set out in the last of the above quotations seems to be a curious twist of the "but for" inquiry employed to determine the existence of actual causation. Thus, to say that injury would not have occurred but for the intervenor's act is not quite the same thing as saying that the accident would have happened without the defendant's negligence. In most cases of concurring negligence, it can be said that one defendant's negligence would not have caused an accident but for the negligence of the other; and if this is to be the test of liability, neither defendant will be liable. Many of the cases in which this "but for" reasoning is used involve factual situations in which defendant's negligence has not increased the risk of injury and the outcome reached by the court is the proper one.[148]

At one time the North Carolina Supreme Court held that intervening acts, to relieve the original defendant of liability, had to be gross and palpable.[149] Although this test of defendant's liability when another cause intervenes has been replaced by foreseeability,[150] the extraordinary nature of the intervening cause may still relieve the defendant of liability. Defendant's responsibility has been held not to extend to injury brought about by the intervenor's intentional[151] or criminal[152] conduct, when the intervenor acted with knowledge of the danger that existed,[153] or when his conduct was reckless or grossly negligent.[154] If existing

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[147]Hudson v. Petroleum Transit Co., 250 N.C. 435, 445, 108 S.E.2d 900, 907 (1959); *accord, e.g.*, Howze v. McCall, 249 N.C. 250, 106 S.E.2d 236 (1958); Mintz v. Town of Murphy, 235 N.C. 304, 69 S.E.2d 849 (1952); Jeffries v. Powell, 221 N.C. 415, 20 S.E.2d 561 (1942).

[148]*See, e.g.*, Hudson v. Petroleum Transit Co., 250 N.C. 435, 108 S.E.2d 900 (1959); Smith v. Grubb, 238 N.C. 665, 78 S.E.2d 598 (1953).

[149]*See* cases cited note 94 *supra*.

[150]*See* cases cited note 95 *supra*.

[151]Herring v. Humphrey, 254 N.C. 741, 119 S.E.2d 913 (1961) (child's intentional act of running unlocked bulldozer into house); Lineberry v. North Carolina Ry., 187 N.C. 786, 123 S.E. 1 (1924) (child pushed playmate into speeding train); Fanning v. J.G. White & Co., 148 N.C. 541, 62 S.E. 734 (1908) (stranger fired bullet into shanty in which dynamite negligently stored).

[152]Williams v. Mickens, 247 N.C. 262, 100 S.E.2d 511 (1957) (negligent operation of car by thief); Ward v. Southern Ry., 206 N.C. 530, 174 S.E. 443 (1934) (employee injured by coal thrown from railway car by thieves); Chancey v. Norfolk & W. Ry., 174 N.C. 351, 93 S.E. 834 (1917) (railway passenger robbed in dark, overcrowded car).

[153]Rulane Gas Co. v. Montgomery Ward & Co., 231 N.C. 270, 56 S.E.2d 689 (1949); Powers v. S. Sternberg & Co., 213 N.C. 41, 195 S.E. 88 (1938).

[154]Faircloth v. Atlantic Coast Line R.R., 247 N.C. 190, 100 S.E.2d 328 (1957); Jeffries v. Powell, 221 N.C. 415, 20 S.E.2d 561 (1942); Newell v. Darnell, 209 N.C. 254, 183 S.E. 374 (1936).

circumstances indicate that events out of the ordinary may intervene—a fact sometimes difficult to prove to the court's satisfaction[155]—their occurrence will not insultate the defendant from liability.[156]

The classic illustration of the type of case under consideration is that of the plaintiff who is deliberately pushed into an open excavation negligently left unguarded by the defendant. The decision that defendant is not liable may be justified simply by holding that the intervening intentional act was unforeseeable or by holding that the result was not within the risks created by defendant's conduct. Defendant risked the possibility that someone would negligently or inadvertently be pushed or fall into the excavation; he did not, however, risk the result that someone would be intentionally pushed into it.

To quarrel with these seemingly plausible conclusions may appear to be unreasonable. Yet, this approach to the application of the foreseeability concept is troublesome. Injury has resulted from the very risk that made defendant's conduct negligent—the unguarded excavation. It is known that there are some people who will recklessly or intentionally act upon a perilous situation to cause injury to others, and their existence increases the potential danger of the risk defendant has created. If no significant risks were otherwise involved in defendant's conduct, reasonable care would not require him to safeguard against such intervening acts. If, however, his conduct in itself is unreasonable, it is difficult to see why the intervention of intentional conduct is a basis for terminating his liability rather than an additional reason to hold him liable. Further, an analysis that denies defendant's liability because of unforeseeability of the *specific* intervening conduct that precipitated the risk would perhaps be even more objectionable. That view would relieve the defendant of liability in most cases in which intervening causes of any kind were involved.

The decisive issue in these cases may not be foreseeability. Further, the crucial fact in them may not be the intentional or criminal nature of the intervenor's conduct but instead may be his knowledge of the existence of the dangerous situation upon which he acts. The decision

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[155]Leake v. Queen City Coach Co., 270 N.C. 669, 155 S.E.2d 161 (1967) (unforesseable that loud and aggressive drunk on bus will assault passenger); Ward v. Southern Ry., 206 N.C. 530, 174 S.E. 443 (1934) (unforeseeable that employee will be injured by coal thrown from railway car by thieves whose mission was foreseeable); Chancey v. Norfolk & W. Ry., 174 N.C. 351, 93 S.E. 834 (1917) (unforeseeable that railway passenger will be robbed in dark crowded car).

[156]Stanley v. Southern Ry., 160 N.C. 323, 76 S.E. 221 (1912); Penny v. Atlantic Coast Line R.R., 133 N.C. 221, 45 S.E. 563 (1903); Britton v. Atlanta & C. Air-Line Ry., 88 N.C. 536 (1882).

not to impose liability on the defendant is a policy decision to shift responsibility from the defendant to the intervenor. It is a decision that when the wrongdoer with knowledge of the danger acts deliberately or recklessly to bring it about, basic fairness dictates that responsibility for the accident be placed on him. The North Carolina case that perhaps comes closest to recognizing this policy as the basis for decision is *Rulane Gas Co. v. Montgomery Ward & Co.*,[157] a case in which the intervening conduct was not intentional. Defendant sold a defective hot water heater to plaintiff and because of the defect gas escaped into the furnace room where the heater was installed. A repairman was called and warned of the presence of gas in the room. The repairman, after entering the furnace room, struck a match and the gas exploded. The court, in holding the seller of the defective heater not liable, emphasized that the repairman had acted with knowledge of the danger that existed.

Shifting responsibility, although seldom mentioned by the court, seems to have had a significant influence on the North Carolina decisions. The intervenor's conduct, when characterized as gross, palpable, or reckless by the court, has been held to insulate the defendant's negligence even when the intervenor had no knowledge of the danger defendant's negligence had created.[158] In some of these cases other circumstances, such as a dangerous railroad crossing or a congested highway should have alerted the intervenor to the need for caution, but he was unaware of the increased danger created by defendant's negligence.[159] It is difficult to understand how these cases involve anything more than concurring negligence. For example, it is not apparent why, in a railroad-crossing collision, a motorist's speed or failure to keep a proper lookout is regarded as an intervening cause to the railroad's speed and failure to warn. And it is not clear why, even as between the wrongdoers, basic fairness would place responsibility for the accident on the motorist. Both the engineer and the motorist were negligent; the negligence of each risked the danger of collision; and both were aware of the need for special caution because of the crossing.

The idea of shifting responsibility may account for another line of

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[157]231 N.C. 270, 56 S.E.2d 689 (1949).

[158]Hudson v. Petroleum Transit Co., 250 N.C. 435, 108 S.E.2d 900 (1959); Faircloth v. Atlantic Coast Line R.R., 247 N.C. 190, 100 S.E.2d 328 (1957); Jeffries v. Powell, 221 N.C. 415, 20 S.E.2d 561 (1942); Newell v. Darnell, 209 N.C. 254, 183 S.E. 374 (1936).

[159]Faircloth v. Atlantic Coast Line R.R., 247 N.C. 190, 100 S.E.2d 328 (1957); Jones v. Atlantic Coast Line R.R., 235 N.C. 640, 70 S.E.2d 669 (1952).

decisions[160] in which the court has adopted principles, substantially identical to those involved in last clear chance, to allocate liability among several defendants whose negligent acts have combined to injure a third person. Under these principles, when one defendant negligently creates a dangerous condition upon which the negligence of another defendant operates to cause injury to the plaintiff, the first defendant is relieved of liability to the plaintiff if the other defendant discovered or could have discovered the danger in time to avoid the accident.[161] For example, in *McLaney v. Anchor Motor Freight, Inc.*[162] the first defendant negligently parked his truck on the highway and the second defendant, who failed to keep a proper lookout and did not discover the presence of the truck, collided with it. The court held that the plaintiff, who was injured in the collision, had no cause of action against the first defendant.

Both the decisions and the incorporation of the principles of last clear chance into the question of intervening cause seem wrong. The problems in the two situations to which the principles are applied bear little resemblance. Last clear chance applies when the defendant has been negligent and the plaintiff has been contributorily negligent. Its purpose is to lessen the harshness of the bar of contributory negligence. It applies to hold the defendant liable despite the plaintiff's contributory negligence. In stark contrast, the principles, when applied to intervening cause, restrict rather than enhance plaintiff's right to recover. Finally, to release the defendant and to leave the injured plaintiff to take whatever chances may be involved in seeking recovery from the intervenor seems repugnant to any sense of basic fairness.

The rule that liability exists for a foreseeable risk realized in an unforeseeable way is generally recognized.[163] Its thrust is that a defendant will be held liable for injury caused by an unreasonable risk of his conduct even though he could not foresee the way in which the risk would be activated or the manner in which it would cause harm. As a risk created by defendant's conduct may materialize in injury in a number of ways, the fact that the way in which it was precipitated was

[160]Clark v. Lambreth, 235 N.C. 578, 70 S.E.2d 828 (1952); Ferguson v. City of Asheville, 213 N.C. 569, 197 S.E. 146 (1938). *But see* Caulder v. Gresham, 224 N.C. 402, 30 S.E.2d 312 (1944); Powers v. S. Sternberg & Co., 213 N.C. 41, 195 S.E. 88 (1938).

[161]Owens v. Norfolk & W. Ry., 258 N.C. 92, 128 S.E.2d 4 (1962); Jeffries v. Powell, 221 N.C. 415, 20 S.E.2d 561 (1942); Hinnant v. Atlantic Coast Line R.R., 202 N.C. 489, 163 S.E. 555 (1932).

[162]236 N.C. 714, 74 S.E.2d 36 (1953).

[163]W. PROSSER, *supra* note 60, § 44, at 286-89.

unforeseeable is not considered significant enough to relieve the defendant of liability. If without the unforeseeable intervening cause defendant's conduct involved no unreasonable risks or if because of its intervention the risk causing harm is a different one from or of greater magnitude than risks threatened by his conduct, defendant will not be held responsible. However, when the injury is the one risked by defendant's conduct, the result, though brought about by an unforeseeable intervening cause, is reasonably to be attributed to defendant's fault.

The rule imposing liability for risked harm brought about in an unforeseeable way has been sparingly applied by the North Carolina Supreme Court. It has been most consistently used in cases in which an intervening act of God combines with defendant's negligence to cause injury.[164] Otherwise,[165] only in an occasional case is liability imposed,[166] and when acts of third parties intervene, imposition of liability is especially unlikely.[167] The court's reluctance to hold the defendant liable is demonstrated by its opinion in *Phelps v. City of Winston-Salem*.[168] Defendant's negligent storage of combustibles created a fire hazard that may have been ignited by a third person or unknown source. In regard to defendant's liability under these circumstances, the court said:

> The law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible. A man's responsibility for his negligence must end somewhere. If the connection between negligence and the injury appears unnatural, unreasonable, and improbable in light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause. It imposes too heavy a responsibility for

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[164]Olan Mills, Inc. v. Cannon Aircraft Executive Terminal, Inc., 273 N.C. 519, 160 S.E.2d 735 (1968); Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925); Pickens County v. Jennings, 181 N.C. 393, 107 S.E. 244 (1921); Harris v. Norfolk S.R.R., 173 N.C. 110, 91 S.E. 691 (1917).

[165]Johnson v. Meyer's Co., 246 N.C. 310, 98 S.E.2d 315 (1957) (stranger backed car into improperly secured sign in parking lot; no liability); Alford v. Washington, 238 N.C. 694, 78 S.E.2d 915 (1953) (car collided with pole and caused uninsulated electric wires to fall; no liability); Davis v. Carolina Power & Light Co., 238 N.C. 106, 76 S.E.2d 378 (1953) (metal tape thrown over uninsulated power line; no liability); Pugh v. Tidewater Power Co., 237 N.C. 693, 75 S.E.2d 766 (1953) (metal wire on which kite flown came into contact with uninsulated power lines).

[166]Shepard v. Rheem Mfg. Co., 251 N.C. 751, 112 S.E.2d 380 (1960) (defective hot water heater sold by defendant installed by contractor in room without ventilation); Newton v. Texas Co., 180 N.C. 561, 105 S.E. 433 (1920) (negligently spilled gasoline ignited by unknown source); Dillon v. City of Raleigh, 124 N.C. 184, 32 S.E. 548 (1899) (runaway horse ran into post in street).

[167]*See* cases cited in notes 151-6 *supra*.

[168]272 N.C. 24, 157 S.E.2d 719 (1967).

> negligence to hold the tort-feasor responsible for what is unusual and unlikely to happen or for what was only remotely and slightly probable.[169]

Even when a person's own fault has played a part in it, a natural response is to sympathize with his misfortune when it has occurred in an unusual or unexpected way. However, this response, when defendant's negligence has caused harm to another person in an unexpected way, may disguise the issue to be decided. A loss has occurred and either defendant or the injured person must bear that loss. Defendant's negligence has played a substantial part in causing the loss, and the risk that brought it about was one of those that made his conduct negligent. The injured person's role is simply that of the victim. Although fault is accepted as the test for extent of liability as well as its existence, the North Carolina decisions that leave the injured person to bear the loss under these circumstances seem wrong.

Secondary Risks of Negligent Conduct

Sometimes injury is not caused by one of the risks threatened directly by the wrongdoer's conduct but by a risk that is incident to the situation that his negligence has created. The negligent conduct has left the plaintiff in a position of danger, and he is injured by the danger or by his or a third person's attempt to extricate him from it. The rescuer himself may be injured in his effort to aid the plaintiff. In the course of medical treatment of injuries inflicted by the defendant's negligence, additional injuries may be incurred either incidental to normal treatment or because of the doctor's malpractice. The plaintiff's weakened or impaired condition because of the injury from defendant's negligence may make him susceptible to further injury. In some of these instances it is easy enough to say that the risk that caused injury was foreseeable; in others the foreseeability of the intervening cause, when viewed at the time of defendant's conduct, is debatable.

Whether or not these and similar intervening causes are foreseeable, extension of defendant's responsibility to include them seems appropriate. When looked at in the context of the situation defendant's negligence has created, they may be regarded as a normal incident of that situation or, at the least, as not an abnormal or unusual consequence of it. Although courts have imposed liability by holding such intervening

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[169] *Id.* at 30, 157 S.E.2d at 723.

causes to be foreseeable, a more sensible and reliable approach may be to recognize that the determination of extent of liability is not only affected by what defendant could anticipate before he acted but also by circumstances his acts have brought into existence.

A result of defendant's negligent conduct may be to place the plaintiff in a position in which harm to him is likely to occur. Defendant's negligent operation of a motor vehicle may knock the plaintiff into the path of an oncoming vehicle[170] or leave him helpless in the street[171] where he is run over by another vehicle. The collision caused by defendant's negligence may subject the plaintiff's car and its passengers to the hazards of a second collision with another car.[172] In all of these instances the risk of further injury is reasonably attributed to the defendant's fault, and he is held liable for the harm that occurs. Similarly, when plaintiff, dazed by the first impact, walked into the highway into the path of an oncoming car, the defendant, whose negligence caused the first collision, was held liable for injuries incurred when the plaintiff was struck by the other car.[173]

If defendant's negligence does not increase the risk of injury to the plaintiff through the second impact, he should not be held liable for its consequences. Thus in *Batts v. Faggart*[174] liability was not imposed when after the collision plaintiff had regained his faculties, turned his car around, and begun to travel in the proper traffic lane when his car was struck in the rear by another negligently operated vehicle. At the time of the second collision the increased risk of traffic hazards to which the original collision exposed the plaintiff had come to an end, and the danger of an accident was no greater than it would have been had the first collision not occurred.

The determination whether defendant's negligence has increased the risk of the second collision may be a difficult one. For example, in *Darrock v. Johnson*[175] the defendant in rounding a curve drove his car across the center line of the highway and collided with plaintiff's car. Immediately thereafter another car crossed the center line and struck

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[170]Hodgin v. North Carolina Pub.-Serv. Corp., 179 N.C. 449, 102 S.E. 748 (1920).

[171]Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937); West v. Collins Baking Co., 208 N.C. 526, 181 S.E. 551 (1935).

[172]Riddle v. Artis, 243 N.C. 668, 91 S.E.2d 894 (1956); Barber v. Wooten, 234 N.C. 107, 66 S.E.2d 690 (1951).

[173]Hall v. Coble Dairies, Inc., 234 N.C. 206, 67 S.E.2d 63 (1951).

[174]260 N.C. 641, 133 S.E.2d 504 (1963).

[175]250 N.C. 307, 108 S.E.2d 589 (1959).

plaintiff's car. Personal injuries to the plaintiff resulted from the second collision only. Unless the first impact has impeded the plaintiff's ability to take evasive action to avoid the second car, a plausible argument can be made that it has not increased the risk of the second collision. On the other hand, it seems so likely that the first collision had a significant influence upon the driver of the second car who was suddenly confronted with it that, in the absence of proof to the contrary, it should be assumed that defendant's conduct increased the risk of the second collision. The court, without analysis of the problem, held the defendant liable.

One other case deserves attention. In *Copple v. Warner*[176] the first collision jammed two vehicles together in the proper lane of travel. After the drivers had got out of their cars and separated them, another motorist crossed the center line of the highway and collided with the car defendant had struck and injured a passenger who sat in it. The court, holding the defendant not liable, emphasized the appreciable time lapse between the first and second collisions and the fact that the car was left in the proper lane of travel after the first collision. The importance of the second fact is apparent. While the presence of a car at a standstill may enhance the risk of a collision with another car traveling in the traffic lane in which it is stranded, it does not increase the risk that a motorist driving in the other lane of travel will, when confronted with no emergency, drive his car across the center line to cause a collision. The significance of time lapse between the collisions is less apparent. Probably its importance is the opportunity it gave the plaintiff to extricate himself from the danger. Once the passenger was aware of the risk and had reasonable opportunity to avoid it, defendant's responsibility should come to an end.

In some instances defendant may be held liable for the entire harm caused by successive impacts although his negligence has not increased the risk of the second impact.[177] The basis for liability is the practical impossibility of apportioning damages when the impacts produce an indivisible injury or separate injuries which cannot be related to any specific impact. These decisions represent a policy decision that it is better to hold a wrongdoer for harm he may not have caused than to deny the innocent plaintiff all recovery.

Defendant is also responsible when a person endangered by his

[176]260 N.C. 727, 133 S.E.2d 641 (1963).

[177]For discussion, *see* Byrd, *supra* note 1, at 275-77.

negligence injures himself[178] or a third person[179] while attempting to escape the danger. Neither the fact that defendant was not involved directly in the accident[180] nor the fact that injury occurred in a different way than that risked by his conduct[181] will preclude imposition of liability. For example, when defendant's negligence threatens a collision between his car and another, and the driver of the other car through evasive action avoids that collision but in doing so is injured in another accident, defendant is liable.[182] The risk that causes injury in each case arises out of the situation created by defendant's negligence, and whether or not it is regarded as foreseeable, defendant's liability should clearly include the harm it has caused.

Only a slight extension of these principles is required to hold the wrongdoer liable to a third party who is injured while attempting to aid the person endangered by his negligence. Under the "rescue doctrine" the court has permitted the rescuer to recover not only when a third person was imperiled[183] but also when the negligent party placed himself in a position of peril[184] from which the rescuer attempted to extricate him. The negligence of the person to the aid of whom the rescuer comes will not relieve the defendant of liability to him,[185] and the rescuer's own conduct in encountering a known danger, even when risk to his own life may be involved, to save the life of another will not bar his recovery.[186]

The same rules have been applied to injury incurred by an individ-

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[178]Underwood v. Gay, 268 N.C. 715, 151 S.E.2d 590 (1966) (per curiam) (plaintiff, in taking evasive action to avoid striking defendant's truck ran off road); Bondurant v. Mastin, 252 N.C. 190, 113 S.E.2d 292 (1960) (plaintiff, in taking evasive action, collided with oncoming truck).

[179]Williams v. Boulerice, 268 N.C. 62, 149 S.E.2d 590 (1966) (injury to passenger in car that left road to avoid collision with defendant's car); Cotton Co. v. Ford, 239 N.C. 292, 79 S.E.2d 389 (1954) (third person's evasive action caused him to collide with plaintiff's car).

[180]Slaughter v. Slaughter, 264 N.C. 732, 142 S.E.2d 683 (1965) (plaintiff, frightened by defendant's conduct, fell while running away); Langford v. Shu, 258 N.C. 135, 128 S.E.2d 210 (1962) (plaintiff stepped into brick wall when frightened by practical joke); Morgan v. Bell Bakeries, Inc., 246 N.C. 429, 98 S.E.2d 464 (1957) (truck, in effort to avoid collision with defendant's truck, jackknifed across road and was struck by oncoming truck).

[181]Robertson v. Ghee, 262 N.C. 584, 138 S.E.2d 220 (1964) (per curiam) (defendant's negligence caused wreck in which passenger was thrown onto road; plaintiff, in taking evasive action to avoid striking passenger, ran off road); Hinton v. Southern Ry., 172 N.C. 587, 90 S.E. 756 (1916) (plaintiff, to avoid collision with train, ran car into building).

[182]*See* cases cited notes 178-81 *supra*.

[183]Bumgarner v. Southern Ry., 247 N.C. 374, 100 S.E.2d 830 (1957); Norris v. Atlantic Coast Line R.R., 152 N.C. 505, 67 S.E. 1017 (1910).

[184]Britt v. Mangum, 261 N.C. 250, 134 S.E.2d 235 (1964).

[185]Norris v. Atlantic Coast Line R.R., 152 N.C. 505, 67 S.E. 1017 (1910).

[186]*See* cases cited note 183 *supra*.

ual in an effort to save his own property[187] or that of others[188] from danger created by defendant's negligence. However, the cases "make some distinction between risks allowable when human life is at stake and those when the destruction of property is presently threatened,"[189] and the estate of an employee who, after reaching a position of safety, recklessly returned to a burning building to save his employer's property has no action for his death against the person who negligently set the fire.[190] But recognition is given to the fact "that it is both the right and the duty of an owner to make every reasonable endeavor to save his property from destruction and that in passing upon his conduct full allowance shall be made for the natural impulse prompting the effort and for the emergency under which he acts."[191]

Essentially the same approach is used when plaintiff is injured in an attempt to avert impending danger threatened by defendant's conduct to the person or property of others. The risk to the person who attempts to remedy the situation is held to come within the scope of defendant's responsibility, and his recovery will not be barred by contributory negligence solely on the basis of the fact that he has acted in the face of known danger.[192]

Under the general principle that holds a defendant responsible for those risks that are not an abnormal or unusual incident of the situation in which his negligence has placed the plaintiff, a wrongdoer has been held liable for additional injuries sustained by the plaintiff in the course of normal medical treatment of the original injuries caused by his negligence.[193] Further, in most jurisdictions the defendant is held responsible for the malpractice of a physician carefully chosen by the plaintiff, unless the physician's negligence is highly unusual.[194] A number of North Carolina decisions[195] are consistent with this view, but uncertainty

[187]McKay v. Atlantic Coast Line R.R., 160 N.C. 260, 75 S.E. 1081 (1912); Burnett v. Atlantic Coast Line R.R., 132 N.C. 261, 43 S.E. 797 (1903).

[188]Rodgers v. Thompson, 256 N.C. 265, 123 S.E.2d 785 (1962) (by implication).

[189]McKay v. Atlantic Coast Line R.R., 160 N.C. 260, 262, 75 S.E. 1081, 1082 (1912).

[190]Pegram v. Seaboard Air Line Ry., 139 N.C. 303, 51 S.E. 975 (1905).

[191]McKay v. Atlantic Coast Line R.R., 160 N.C. 260, 262, 75 S.E. 1081, 1082 (1912).

[192]Moore v. Beard-Laney, Inc., 263 N.C. 601, 139 S.E.2d 879 (1965); Rodgers v. Thompson, 256 N.C. 265, 123 S.E.2d 785 (1962).

[193]Lane v. Southern Ry., 192 N.C. 287, 134 S.E. 855 (1926); Sears v. Atlantic Coast Line R.R., 169 N.C. 446, 86 S.E. 176 (1915).

[194]W. PROSSER, *supra* note 60, § 44, at 278-79.

[195]*See, e.g.*, Bell v. Hankins, 249 N.C. 199, 105 S.E.2d 642 (1958); Smith v. Thompson, 210 N.C. 672, 188 S.E. 395 (1936).

about the rule that will be applied has arisen out of a later case.[196]

In the earlier decisions the issue before the court was whether a release of the original tortfeasor by the injured person operated to discharge the negligent physician from liability to him. The court, holding that the physician was discharged by the release, recognized and approved the general rule that a tortfeasor is liable for aggravation of injuries caused by a physician's malpractice. The holding in these cases was overruled by a statute[197] which states that suit against the physician is not barred by release of the original tortfeasor unless its terms expressly provide for his discharge. In *Galloway v. Lawrence*[198] the statute was applied to uphold an action against a physician by an injured person who had earlier executed a release to the original tortfeasor. The court drew a comparison between the present case and a wrongful death case decided before enactment of the statute and noted in effect that death was an indivisible injury for which payment by the original tortfeasor would constitute a complete satisfaction. The court then observed: "The distinction is this: plaintiffs here seek to recover for a second, independent, subsequent injury following that which was inflicted by [the original defendant]. These actions are based upon a later and separate tort."[199]

It is difficult to quarrel with the quoted statement, but it is equally difficult to understand what significance the court intended it to have. Perhaps the court was only distinguishing personal injury and wrongful death, as did a later decision of the North Carolina Court of Appeals in holding the statute inapplicable to a wrongful death case.[200] Its purpose may have been simply to recognize that one possible objective intended by the legislature—to permit the plaintiff to settle with the original defendant for injuries he caused and then to sue the physician for injuries caused by the malpractice—is at least theoretically feasible. This view, in light of the statute, would not be inconsistent with the rule that the original tortfeasor is liable for the physician's subsequent malpractice. On the other hand, the court may have intended to suggest that the malpractice is a separate tort for which the physician alone is lia-

[196]Galloway v. Lawrence, 263 N.C. 433, 139 S.E.2d 761 (1965).
[197]N.C. GEN. STAT. § 1-540.1 (1969).
[198]263 N.C. 433, 139 S.E.2d 761 (1964).
[199]*Id.* at 435, 139 S.E.2d at 763.
[200]Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

ble.[201] If so, the dictum clearly conflicts with the rule recognized in earlier decisions. The fact that the court, by dictum in a case decided after *Galloway*, recognized the rule that the tortfeasor is liable for the physician's malpractice might indicate that this last interpretation was not intended.[202]

Three other decisions create additional confusion in this area. In two[203] the court seems to hold that when the physician who treats the plaintiff is selected by the defendant, the defendant will be liable for injuries caused by the physician's malpractice only if he was negligent in his selection of the physician. The other case[204] contained at least dictum to the effect that the original tortfeasor, after paying for the entire injury, has no right to contribution or indemnification against the physician. Both cases seem inconsistent with the rule that the defendant is liable for the physician's malpractice; however, in the latter case the court appears to accept it for purposes of determining the original tortfeasor's liability.

The principle that a wrongdoer is responsible for risks that are a normal incident of the situation his negligence has created may apply to a variety of other circumstances. He has been held liable for a second injury that the original injury has contributed to.[205] Liability has also been imposed for damage caused by a backfire started in an effort to control a fire set by defendant's negligence.[206] Also, unsuccessful efforts of others to bring under control a risk of the situation created by defendant's conduct have been held not to terminate his liability.[207]

SOME OBSERVATIONS

Everyone has had something to say about causation, and an enor-

[201]For a discussion of practical difficulties that would arise if this position were taken, *see* Byrd & Dobbs, *supra* note 81, at 931-32.

[202]Bryant v. Dougherty, 267 N.C. 545, 548-49, 148 S.E.2d 548, 552 (1966).

[203]Gosnell v. Southern Ry., 202 N.C. 234, 162 S.E. 569 (1932); McMahan v. Carolina Spruce Co., 180 N.C. 636, 105 S.E. 439 (1920).

[204]Bost v. Metcalfe, 219 N.C. 607, 14 S.E.2d 648 (1941).

[205]Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964).

[206]Balcum v. Johnson, 177 N.C. 213, 98 S.E. 532 (1919).

[207]Hardy v. Hines Bros. Lumber Co., 160 N.C. 113, 75 S.E. 855 (1912) (unsuccessful effort to extinguish fire); Harton v. Forest City Tel. Co., 141 N.C. 455, 54 S.E. 299 (1906) (fallen telephone pole, propped up by passerby, later fell). *But see* Baker v. City of Lumberton, 239 N.C. 401, 79 S.E.2d 886 (1935) (fallen, uninsulated electric wires supposedly "dead" until moved by homeowner; no liability); Doggett v. Richmond & D.R.R., 78 N.C. 305 (1878) (fire apparently extinguished by third parties later rekindled; no liability).

mous volume of literature on the subject exists. Some writers have attempted to structure definite rules that could be applied with certainty to the solution of the problem of the extent of legal responsibility.[208] Others have rejected these attempts and urged that the question of legal responsibility is one that can be decided only on an *ad hoc* case-by-case basis.[209] While only a few years ago causation was the burning issue that attracted the thoughts and energies of tort scholars, their attention is now focused on the concept of duty, and proximate cause has fallen somewhat into disfavor. However, the task of determining the extent of a tortfeasor's responsibility for harm his negligence has caused, whether dealt with under proximate cause or some other legal concept, is likely to confront courts as long as the fault system remains in effect.

The foreseeability rule which has been adopted by the North Carolina Supreme Court is perhaps the best broad general principle that can be devised for determination of legal responsibility. Its usefulness can be fostered, however, by the frank recognition that other factors do influence the decision whether a wrongdoer is to be held liable for consequences his negligence has caused. Further, the inquiry whether a result or event is foreseeable, unless stated with care, may place an undue emphasis upon the details of what has happened and in this way prejudge to some extent the determination to be made. Even the broader inquiry of the fairness of holding defendant liable for particular consequences may tend to focus too much upon the wrongdoer's plight and to ignore the crucial fact that a loss has occurred that will fall upon the injured person if the defendant is relieved of liability.

In the area of intervening cause, although foreseeability is stated to be the test of liability, the idea of shifting responsibility seems to have played a major role in the court's decisions. Although the policy incorporated into this concept may legitimately affect the determination of liability, its extensive use by the North Carolina Supreme Court is difficult to justify. In some cases in which it is the apparent basis for decision it is not easy to see why, even when only the interest of the wrongdoers are taken into account, one of them should be held liable any more than the other. More importantly, except in unusual cases as when the intervenor deliberately brings about injury, there is no good

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[208] *E.g.*, Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CALIF. L. REV. 229, 396, 471 (1932); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925).

[209] *E.g.*, Pound, *Causation*, 67 YALE L.J. 1 (1957).

reason to regard the relative fault of the wrongdoers as a factor that should limit the injured person's right to recover against them. A definite tendency to focus upon the foreseeability of a particular intervening act is evident in the North Carolina decisions. This tendency may explain the relatively infrequent use by the court of the well-established rule that holds a tortfeasor liable for harm from foreseeable risks of his conduct that materialize in an unforeseeable way.

Understanding of the North Carolina decisions on causation may require recognition of the fact that in many of the cases decided on the basis of proximate cause principles the decisive issue was probably one of negligence or duty. The same caution is necessary in other instances as well. For example, when the facts show that a defendant's negligence has not increased the risk of the injury incurred, it will frequently conclude that the intervening cause that contributed to produce the accident was unforeseeable. Finally, many rules announced by the court, such as the "but for" and "intervention of an outside agency or responsible third party" rationales, probably should not be regarded as useful analytical tools despite the court's frequent reference to them.

One final observation should be made. Whatever else the court may or may not have done, it has achieved a surprising consistency in the outcome of the cases it has decided.