Torts

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Class 20

Proximate Cause

To recover damages in a negligence suit, the plaintiff must show not only factual causation, but also something more: what lawyers call "proximate cause" or "legal cause." Some injuries, courts say, are too unpredictable for defendants to be held responsible for them. Generally, courts ask whether an injury is foreseeable. But why do we have proximate cause as a requirement? Should we? And what does it mean for an injury to be foreseeable? How generally or abstractly should the question be framed? What needs to be foreseeable—the specific plaintiff or type of injury, or is any type of harm adequate?

Some courts make a special exception for proximate cause when the plaintiff's case involves not only the defendant but also third-party actors. The Second Restatement uses the language of "superseding causes" that cut off liability, but specifically excludes criminal or negligent acts from being a superseding cause if those acts were a foreseeable consequence of the defendant's negligence or if the likelihood of those acts was the reason why the defendant's conduct was negligent. Restatement (Second) of Torts, §§ 448, 449. The Third Restatement abandons the "superseding" language from the Second Restatement, but it arrives at much the same conclusions. The Third Restatement holds that defendants will be liable, despite intervening actors, for all damages that "result from the risks that made the [defendant's] conduct tortious." Restatement (Third) of Torts: Liab. for Phys. and Emot. Harm, § 34 (2010). Does it make sense to treat these cases differently?

As you read the following cases, think through the normative judgments inherent in the law of proximate cause and judge for yourself whether the balance struck by current law is the right one.

20.1
Proximate Cause: Foreseeability Norms

In the context of proximate cause, cases often turn on whether the harm to the plaintiff was foreseeable. In this section, we will consider the rise of and justification for this definition as well as its application.

20.1.1

In re Polemis

In re an Arbitration Between Polemis and Another and Furness, Withy & Co., Ltd.
Court of Appeal, 1921. [1921]. 3 K.B. 560, [1921] All E.R. 40.

[The owners of the ship Thrasyvoulos sought to recover damages from the defendants who chartered the ship. The contract of charter was read to hold the defendant charterers responsible for damage caused by fire due to their negligence. Stevedores, for whose conduct the defendants were responsible, were moving benzine from one hold to another by means of a sling. The stevedores had placed wooden boards across an opening above one hold to make a temporary platform to facilitate the transfer. "When the sling containing the cases of benzine was being hoisted up, owing to the negligence of the stevedores the rope by which the sling was hoisted or the sling itself came in contact with the boards, causing one of the boards to fall into the hold, and the fall was immediately followed by a rush of flames, the result being the total destruction of the ship."

The case was heard by arbitrators who found "that the fire arose from a spark igniting petrol vapour in the hold; that the spark was caused by the falling board coming into contact with some substance in the hold; . . . [and] that the causing of the spark could not reasonably have been anticipated from the falling of the board though some damage to the ship might reasonably have been anticipated."

Damages were set at almost £200,000.

Subject to the court's opinion on the law, the arbitrators decided that the owners were entitled to recover the full loss from the charterers. The court was required to accept the arbitrator's findings. Although the case arose in the contract context, none of the three opinions mentions this point, and all rely on tort cases in their analyses.]

BANKES, L.J.

. . . According to the one view, the consequences which may reasonably be expected to result from a particular act are material only in reference to the question whether the act is or is not a negligent act;

according to the other view, those consequences are the test whether the damages resulting from the act, assuming it to be negligent, are or are not too remote to be recoverable. Sir F. Pollock in his Law of Torts, 11th ed., pp. 39, 40, refers to this difference of view, and calls attention to the fact that the late Mr. Beven, in his book on Negligence, supports the view founded on *Smith v. London and South Western Ry. Co*. . .

In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendant's servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The appellant's junior counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

. . .

For these reasons I think that the appeal fails, and must be dismissed with costs.

SCRUTTON, L.J.

. . .

The second defense is that the damage is too remote from the negligence, as it could not be reasonably foreseen as a consequence. . . To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. once the act is negligent, the fact that its exact operation was not foreseen is immaterial. . . In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused.

Appeal dismissed.

[The concurring opinion of WARRINGTON, L.J. is omitted.]

20.1.2
Wagon Mound (No. 1)

Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Company Ltd [1961] UKPC 1 (18 January 1961)

Privy Council Appeal No. 23 of 1960

Overseas Tankship (U.K.) Limited
- Appellants
v.

Morts Dock & Engineering Company Limited

- Respondents

FROM THE SUPREME COURT OF NEW SOUTH WALES JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JANUARY 1961.

Present at the Hearing:

VISCOUNT SIMONDS

LORD REID

LORD RADCLIFFE

LORD TUCKER

LORD MORRIS OF BORTH-Y-GEST

[Delivered by VISCOUNT SIMONDS]

This appeal is brought from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal by the appellants, Overseas Tankship (U.K.) Ltd" from a judgment of Mr. Justice Kinsella exercising the Admiralty Jurisdiction of that Court in an action in which the appellants were defendants and the respondents Morts Dock & Engineering Co, Ltd. were plaintiffs,

In the action the respondents sought to recover from the appellants compensation fm ,the damage which its property known as the Sheerlegs Wharf in Sydney Harbour and ,the equipment ,thereon had suffered by reason of fire which broke out on the 1st November, 1951. For this damage they claimed that the appellants were in law responsible,

The relevant facts can be, comparatively shortly slated inasmuch as not one of the findings of fact in the exhaustive judgment of the learned trial Judge has been challenged,

The respondents at the relevant time carried on the business of ship-building, ship-repairing and general engineering at Morts Hay, Balmain, in the Port of Sydney, They owned and used for their business the Sheerlegs Wharf, a timber wharf about 400 feet in length and 40 feet wide, where there was a quantity of tools and equipment. In October and November, 1951, a vessel known as the "Corrimal" was moored alongside the wharf and was being refitted by the respondents. Her mast was lying on the wharf and a number of the respondents' employees were working both upon it and upon the vessel itself, using for this purpose electric and oxy-acetylene welding equipment.

At the same time the appellants were chatterers by demise of the 5,5, "Wagon Mound ", an oil-burning vessel which was moored at the Caltex Wharf on the northern shore of the harbour at a distance of about 600 feet from the Sheerlegs Wharf. She was there from about 9 am on the 29th October until 11 am on the 30th October, 1951, for the purpose or discharging gasoline products and taking in bunkering oil.

During the early hours of the 30th October, 1951, a large quantity of bunkering oil was through the carelessness of the appellants' servants allowed to spill into the bay and by 10:30 on the morning of that day it had spread over a considerable part of the bay, being thickly concentrated in some places and particularly along the foreshore near the respondents' property. The appellants made no attempt to disperse the oil. The" Wagon Mound" unberthed and set sail very shortly after.

When the respondents' works manager became aware of the condition of things on the vicinity of the wharf he instructed their workmen that no welding or burning was to be carried on until further orders. He enquired of the manager of the Caltex Oil Company, at whose wharf the "Wagon Mound" was then still berthed, whether they could safely continue their operations on ,the wharf or upon the "Corrimal". The results of this enquiry coupled with his own belief as to the inflammability of furnace oil in the open led him to think that the respondents could safely carry on their operations. He gave instructions accordingly but directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil.

For the remainder of the 30th October and until about 2 p.m. on 1st November work was carried on as usual, the condition and congestion of the oil remaining substantially unaltered. But at about that time the oil under or near the wharf was ignited and a fire, fed initially by the oil, spread rapidly and burned with great intensity. The wharf and the "Corrimal" caught fire and considerable damage was done to the wharf and the equipment upon it.

The outbreak of fire was due, as the learned Judge found, to the fact that there was floating in the oil underneath the wharf a piece of debris on which lay some smouldering cotton waste or rag; which had been set on fire by molten metal falling from the wharf that the cotton waste or rag burst into flames; that the flames from the cotton waste set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil; and that after the floating oil became ignited the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf.

He also made the all important finding, which must be set out in his own words. "The raison d'etre of furnace oil is, of course, that it shall burn, but I find the defendant did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water. This finding was reached after a wealth of evidence which included that of a distinguished scientist Professor Hunter. It receives strong confirmation from the fact that at the trial the respondents strenuously maintained that the appellants had discharged petrol into the bay on no other ground than that, as the spillage was set alight, it could not be furnace oil. An attempt was made before their Lordships' Board to limit in some way the finding of fact but it is clear that it was intended to cover precisely the event that happened.

One other finding must be mentioned. The learned Judge held that apart ,from damage by fire the respondents had suffered some damage from the spillage of oil in that it had got upon their slipways and congealed upon them and interfered - with their use of the slips. He said "The evidence of this damage is slight and no claim for compensation is made in respect of it. Nevertheless it does establish some damage which maybe insignificant in comparison with the magnitude of the damage by fire, but which nevertheless is damage which beyond question was a direct result of the escape of the oil" This upon this footing that their Lordships will consider the question whether the appellants are liable for the fire damage. That consideration must begin with an expression of indebtedness to Mr. Justice Manning for his penetrating analysis of the problems that today beset the question of liability for negligence. In the year 1913 in the case of H.M.S. London (reported in [1914] Prob. 72 at p. 76), a case to which further reference will be made. Sir Samuel Evans, P., said "The doctrine of legal causation, in reference both to the creation of liability and to the measurement of damages, has been much discussed by judges and commentators in this country and in America. Vast numbers of learned and acute judgments and dis¬quisitions have been delivered and written upon the subject. It is difficult to reconcile the decisions and the views of prominent com¬mentators and jurists differ in important respects. It would not be possible or feasible in this judgment to examine them in anything approaching detail." In the near 'hall-century that has passed since the learned President spoke those words the task has not become easier, but it is possible to point to certain landmarks and to indicate certain tendencies which, as their Lordships hope, may serve in some measure to simplify the law.

It is inevitable that first consideration should be given to the case of In re Polemis & Furness Withy & Company Ltd. [1921] 3 K.B. 560 which will henceforward be referred to as "Polemis ". For it was avowedly in deference to that decision and to decisions of the Court of Appeal that followed it that the Full Court was constrained to decide the present case in favour of the respondents. In doing so Mr. Justice Manning after a full examination of that case said "To say that the problems, doubts and difficulties which I have expressed above render it difficult for me to apply the decision in In re Polemis with any degree of confidence to a particular set of facts would be a grave understatement. I can only express the hope that, if not in this case, then in some other case in the near future the subject will be pronounced upon by the House of Lords or the Privy Council in terms which, even if beyond my capacity fully to understand, will facilitate for those placed as I am, its everyday application to current problems." This cri de coeur would in any case he irresistible but in the years that have passed since its decision Polemis has been so much discussed and qualified that it cannot claim, as counsel for the respondents urged fur it, the status of a decision of such long standing that it should not be reviewed.

[…]

[…]

If the line of relevant authority had stopped with Polemis, their Lordships might, whatever their own views as to its unreason, have felt some hesitation about overruling it. But it is far otherwise. It is true that both in England and in many parts of the Commonwealth that decision has from time to time been followed: but in Scotland it has been rejected with determination. It has never been subject to the express scrutiny of either the House of Lords or the Privy Council, though there have been comments upon it in those Supreme Tribunals. Even in the inferior courts judges have, sometimes perhaps unwittingly, declared themselves in a sense adverse to its principle. Thus Lord Justice Asquith himself, who in Thurogood v. Van den Berghs & Jurgens [1951] 2 K.B. 537 had loyally followed Polemis, in Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 Q.B. 528, holding that a complete indemnity for breach of contract was too harsh a rule, decided that "the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach." It is true that in that case the Lord Justice was dealing with damages for breach of contract. But there is nothing in the case to suggest, nor any reason to suppose, that he regarded the measure of damage as different in tort and breach of contract. The words "tort" and "tortious" have perhaps a somewhat sinister sound but, particularly where the

tort is not deliberate but is an act of negligence, it does not seem that there is any more moral obliquity in it than in a perhaps deliberate breach of contract, or that the negligent actor should suffer a severer penalty. In Minister of Pensions v. Chennell [1947] 1 K.B. 253 Denning J. (as he then was) said: "Foreseeability is as a rule vital in cases of contract; and also in cases of negligence, whether it be foreseeability in respect of the person injured as in Palsgref v. Long Island Rly. (discussed by Professor Goodhart in his Essays, p. 129), Donoghue v. Stevenson and Bourhill v. Young, or in respect of intervening causes as in Aldham v. United Dairies (London) Ltd. and Woods v. Duncan. It is doubtful whether In re Polemis and Furness Withy & Co. can survive these decisions. If it does, it is only in respect of neglect of duty to the plaintiff which is the immediate or precipitating cause of damage of an unforeseeable kind." Their Lordships would with respect observe that such a survival rests upon an obscure and precarious condition.

Instances might be multiplied of deviation from the rule in Polemis, but their Lordships think it sufficient to refer to certain later cases in the House of Lords and then to attempt to state what they conceive to be the true principle. In Glasgow Corporation v. Muir [1943] A.C. 448 at p. 454 Lord Thankerton said that it had long been held in Scotland that all that a person can be bound to foresee are the reasonable and probable consequences of the failure to take care judged by the standard of the ordinary reasonable man, while Lord Macmillan said that "it is still left to the judge to decide what in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen." Here there is no suggestion of one criterion for determining culpability (or liability) and another for determining compensation. In Bourhill v. Young [1943] A.C. 91 at p. 101 the double criterion is more directly denied. There Lord Russell of Killowen said : "In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation." This appears to be in flat contradiction to the rule in Polemis and to the dictum of Lord Sumner in Weld-Blundell v. Stephens.

From the tragic case of Woods v. Duncan [11946] A.C. 401, the facts of which are too complicated to be stated at length, some help may be obtained. There Viscount Simon analysed the conditions of establishing liability for negligence and stated them to be (1) that the defendant failed to exercise due care (2) that he owed the injured man the duty to exercise due care, and (3) that his failure to do so was the cause of the injury in the proper sense of the term. He held that the first and third conditions were satisfied, but inasmuch as the damage was due to an extraordinary and unforeseeable combination of circumstances the second condition was not satisfied. Be it observed that to him it was one and the same thing whether the unforeseeability of damage was relevant to liability or compensation. To Lord Russell of Killowen in the same case the test of liability was whether the defendants (Cammell Laird & Co. Ltd.) could reasonably be expected to foresee that the choking of a test cock (itself undoubtedly a careless act) might endanger the lives of those on board; Lord Macmillan asked whether it could be said that they, the defendants, ought to have foreseen as reasonable people that if they failed to detect and rectify the clogging of the hole in the door the result might be that which followed, and later, identifying, as it were, reasonable foreseeability with causation, he said : "the chain of causation, to borrow an apposite phrase, would appear to be composed of missing links."

Enough has been said to show that the authority of Polemis has been severely shaken though lip-service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that in some cases, at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct." It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

This concept applied to the slowly developing law of negligence has led to a great variety of expressions which can, as it appears to their Lordships, be harmonised with little difficulty with the single exception of the so-called rule in Polemis. For, if it is asked why a man should be responsible

for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them. Thus it is that over and over again it has happened that in different judgments in the same case, and sometimes in a single judgment, liability for a consequence has been imposed on the ground that it was reasonably foreseeable or, alternatively, on the ground that it was natural or necessary or probable. The two grounds have been treated as coterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in Polemis. For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible - and all are agreed that some limitation there must be - why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the "direct" consequence) be substituted which leads to no-where but the never-ending and insoluble problems of causation. "The lawyer," said Sir Frederick Pollock, "cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." Yet this is just what he has most unfortunately done and must continue to do if the rule in Polemis is to prevail A conspicuous example occurs when the actor seeks to escape liability on the ground that the "chain of causation" is broken by a "nova causa" or "novus actus interveniens."

[…]

But, it is said, a different position arises if B's careless act has been shown to be negligent and has caused some foreseeable damage to A. Their Lordships have already observed that to hold B liable for consequences however unforeseeable of a careless act, if, but only if, he is at the same time liable for some other damage however trivial, appears to be neither logical nor just. This becomes more clear if it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary. For the same fallacy is at the root of the proposition. It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he has trespassed on Blackacre. Again, suppose a claim by A for damage by fire by the careless act of B. Of what relevance is it to that claim that he has another claim arising out of the same careless act? It would surely not prejudice his claim if that other claim failed: it cannot assist it if it succeeds. Each of them rests on its own bottom, and will fail if it can be established that the damage could not reasonably be foreseen. We have come back to the plain common sense stated by Lord Russell of Killowen in Bourhill v. Young. As Lord Denning said in King v. Phillips [1953] 1 Q.B. 429 at p. 441 "There can be no doubt since Bourhill v. Young that the test of liability for shock is foreseeability of injury by shock." Their Lordships substitute the word "fire" for "shock" and endorse this statement of the law.

[…]

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the respondents' action so far as it related to damage caused by the negligence of the appellants be dismissed with costs but that the action so far as it related to damage caused by nuisance should be remitted to the Full Court to be dealt with as that court may think fit. The respondents must pay the costs of the appellants of this appeal and in the Courts below.

(39371) WI. 8109-.53 150 2/61 D.L.

20.1.3

Darby v. The National Trust

DIANE DARBY

(Widow and Administratrix of the Estate of Kevin Alan Darby, deceased) Claimant

v.

THE NATIONAL TRUST, Respondent

MR I MCLAREN QC (instructed by Messrs Banner Jones Middleton Solicitors, Chesterfield S40 1JY) appeared on behalf of the Claimant

MR R WALKER QC (instructed by Messrs Hextall Erskine, London E1 8ER) appeared on behalf of the Respondent

J U D G M E N T

Monday, 29th January 2001

LORD JUSTICE SCHIEMANN: May LJ will give the first judgment.

LORD JUSTICE MAY: Hardwick Hall, near Chesterfield in Darbyshire, is one of the National Trust's finest properties. It has many visitors both to the hall itself and to its extensive grounds. In the grounds there are, I think, five ponds. Three of these are reasonably close to each other. Two of them are used for fishing, and the National Trust has taken steps to prevent their use for other purposes, including swimming. These steps have been largely successful.

The third pond is called Row Pond 5. It is not used for fishing. It is oval in shape and approximately 60 to 70 feet across. The water is shallow at the edges but towards the centre its depth is at least such that an average swimmer could not stand on the bottom. It may in places be as deep as 10 feet. In the summer when it is warm visitors have used the fond for paddling and swimming.

On 23rd August 1997 Kevin Dodd tragically drowned in this pond. It had been an extremely hot day and at about 7.00 in the evening he went with his wife, the claimant, and the four youngest of their five children to Hardwick Park. Their eldest son, Ryan, was not with them but he had been swimming in the pond earlier that day. The younger children went paddling. After parking their car Kevin also went in the water. The water was murky, but Mrs Darby considered it to be safe because she had seen others swimming and paddling in it before. Her husband was a competent swimmer and she had no reason to believe that there would be any difficulty. Kevin, her husband, swam towards the centre of the pond. The children were still paddling near its edge. He began to play a game which it seems they had played before and which they called “hide a boo”. Kevin would dip beneath the water for a second or two and then pop up again in the same place, smiling. He did this for about five minutes. His wife was watching. She then saw him go underwater, reappear, and put his arms straight in the air, calling her name. She knew that he was in trouble. He sank beneath the water again and effectively was drowned. Mrs Darby called for help. Mr Kevin Morris, who was walking beside one of the other lakes, came to help, and he bravely searched for Mr Darby in the pond and eventually came across him and managed to drag him out. He had been under water for many minutes and it is surprising that he was not at that stage dead. He never, I think, regained consciousness, and he died in hospital on 9th September 1997.

It is evident that visitors quite frequently swam or paddled in this pond. The defendants must be taken to have known this. They did in fact little to discourage or prevent it. There were no warning notices around or in the vicinity of the pond. There were no life-saving equipment. There was a notice somewhere near an entrance to a car park which stated, among other information about opening hours, charging, fishing tickets, the words “Bathing and boating not allowed.” This was legible but not conspicuous and it was part of other information.

The pond was not systematically patrolled. Wardens who had other duties including, for instance, collecting money from fishermen, would check the ponds from time to time and discourage people from swimming in them, telling them of the danger of Weils disease. But there was, so it appears, no set system.

These proceedings were brought by Mrs Darby on her own behalf and on behalf of her husband's estate against the National Trust. She says that they were in breach of the common duty of care under section 2 of the Occupiers' Liability Act 1957 and were as such liable for her husband's death.

On 3rd March 2000 Mrs Assistant Recorder Wilson heard the action and gave judgment for the claimant in the sum of £114,194. This is the defendant's appeal brought by leave of Swinton Thomas LJ against the finding against them on liability. There are also, contingent on the outcome of that appeal, appeals by both the claimant and the defendants against the assistant recorder's quantification of damages.

[…]

The claimant's case on liability in the first instance is very simple. Mrs Darby and her husband had often seen people swimming in the pond and thought it was safe. Her unchallenged evidence was that if there had been “No Swimming” notices around the pond saying that it was dangerous her husband would not have gone swimming. The National Trust did not take such care as in all the circumstances

of the case was reasonable to see that her husband would be reasonably safe in using the premises.
[…]
Mr Walker QC, on behalf the National Trust, submits that the assistant recorder's findings of negligence were all variants of the finding that the defendant ought not to have permitted Mr Darby to swim in the pond at all, as opposed to a failure to provide adequate rescue facilities. […]
The crux of Mr Walker's submission is that the pond had no relevant characteristics making it more dangerous than any other pond, nor did it have any relevant hazards which were not readily apparent. The fact that the water was murky and that it was cold (if it was, which was not established other than by incidental evidence from Mr Morris who retrieved Mr Darby from it) and that its depth in the centre may have been such that bathers would be out of their depth, is entirely typical of such ponds and is obvious. Further, all these matters were known to Mr Darby who had swum in the pond before and who had spent five minutes ducking in and out of the water in the middle of the pond.
[…]

For the respondent, Mrs Darby, there was some difference of emphasis in the submissions made on her behalf by leading and junior counsel. Mr Herbert submitted that swimming in this pond had been condoned for years. The pond was unsafe. It was deep, murky and cold. It was always foreseeable that a swimmer might get into difficulties. […]
Mr Herbert submits that on the evidence of Miss Kirkwood the pond was not reasonably safe as a place in which to conduct unsupervised swimming, yet the defendant permitted persons on the premises so to use it. […]
Mr McLaren QC, when pressed, was inclined, I think, to accept, that the case which depended alone on the risk of drowning was not strong, although he vigorously supported the assistant recorder's conclusion. He submitted that it drew strength from the admitted risk of a swimmer contracting Weils disease. There was no systematic evidence as to the nature of Weils disease, although I understand it to be an unpleasant and occasionally fatal condition transmitted from rats' urine. Mr McLaren submitted that there was a risk which people might not appreciate, the risk of cold water leading to those who are good swimmers in warm swimming pools getting into difficulties in open water and drowning. Putting up a warning notice was a small thing to do and in the circumstances which included the risk of Weils disease entitled the assistant recorder to reach the conclusion as to duty that she did. […]
The risk of Weils disease required a notice. It is permissible, submitted Mr McLaren, for the court to conclude that there was a duty to take a step for the purpose of guarding against Weils disease which would in fact have prevented death by drowning. The cost and expense of the sign would not have been great, and the sign, whose main purpose may have been to prevent the effects of Weils disease, would also have given effective warning against the danger of drowning.
Unpleasant though Weils disease, I have no doubt, is, it was not the kind of risk or damage which Mr Darby suffered, and any duty to warn against Weils disease cannot, in my judgment, support a claim for damages resulting from a quite different cause. I refer to the opinion of Lord Hoffmann in South Australia Asset Management Corporation v York Montague Ltd [1997] AC 191 at 212. He there cites from the speech of Lord Bridge of Harwich in Caparo at 627 in these terms:

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."

Lord Hoffmann then went on:

> "In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect in which the duty was owed."

[…]

Lord Hoffmann then proceeded to give the example of the mountaineer with which practitioners are very familiar. Thus, a case which promotes a duty based on the risk of a swimmer catching Weils disease will not, in my opinion, support a breach of duty founded upon a risk of drowning. The risks are of an intrinsically different kind and so are any dependent duties. […]
For these reasons I would allow the appeal and enter judgment for the defendants. If that is the view of my Lords the appeals on quantum do not arise for decision.
LORD JUSTICE LATHAM: I agree.
LORD JUSTICE SCHIEMANN: I also agree.

(Appeal allowed with costs not to be enforced without further order; claimant's costs assessed at nil; defendants costs to be paid by the Legal Services Commission; application to appeal to the House of Lords refused).

20.2
Intervening Actors

Courts sometimes single out cases in which a third party actor injures the plaintiff. Why might this be? Is it justified? Consider these questions as you read the next three cases.

20.2.1

Doe v. Manheimer, 563 A.2d 699 (Conn. 1989)

GLASS, J.

The difficult issue in this case is whether a landowner may be liable in tort for damages arising from the rape of a pedestrian committed on the landowner's property behind brush and trees that shielded the area from view from the nearby public sidewalk and street.

I

The plaintiff, Jane Doe, worked as a meter reader for the Connecticut Light and Power Company in New London. On July 30, 1984, her employers assigned her to work in the Green Street area. At approximately 8 a.m., as she walked along Green Street, she observed a man on the opposite sidewalk who appeared to be looking for directions. She crossed the street to offer assistance. As she came near, the man, a stranger, reached into a satchel, removed a gun, and held it against her. He forced her from the sidewalk through a paved vacant lot that abutted the street. The man then forced her onto adjacent property owned by the named defendant (hereinafter defendant) some fifty to seventy feet from the sidewalk. The defendant's property extended approximately six and three-quarter feet from the side of his building to the lot boundary parallel to the building. The area into which the plaintiff was forced was bounded by the defendant's building on one side and a retaining wall in the rear. On the other side, overgrown sumac bushes and tall grass shielded the area from view from the sidewalk and street.

750*750 Behind the sumac bushes, the abductor viciously assaulted and raped the plaintiff for thirty minutes. In the commission of the assault, the abductor used various items, including a rope and rubber gloves, which he had carried with him in his satchel. His possession of these items suggested that the sexual assault had been planned. The assailant fled after committing the crime and has never been identified or caught. The effect of the sexual assault upon the plaintiff has been severe. She has attempted suicide on several occasions. Her emotional and psychiatric problems have required and continue to require hospital confinement.

The plaintiff brought an action against the defendant for personal injuries sustained in the assault. The complaint alleged causes of action based on common law negligence, statutory negligence and public nuisance. In essence, she claimed that the defendant had failed to remove the overgrown vegetation although he knew or should have known that, because the neighborhood was a high crime area, third persons might use the overgrowth to conceal the perpetration of crimes against pedestrians. She asserted that, had the overgrowth not been present, the area in which the assault occurred would have been visible to passing motorists and pedestrians. Consequently, she alleged, the overgrowth caused and contributed to the assault and the duration of the assault.

The action was tried to a jury before the court, Walsh, J. Several witnesses described the neighborhood where the sexual assault had been committed as a high crime area. Another rape had occurred in a neighborhood building about three months prior to the sexual assault against the plaintiff. Approximately fourteen months prior to the assault, Clara Manheimer, the defendant's ninety year old mother, had been bound, gagged and robbed in the package store at the front 751*751 of the building on the defendant's property. Prostitution and drug dealing were more prevalent in that section of New London than in other sections. Further, derelicts and homeless people frequented the site where the assault occurred and the adjacent vacant lot through which the plaintiff had been forced from the sidewalk. Various debris littered the area, including liquor and wine bottles and cans. Street people had scattered cardboard boxes, mattresses and blankets that they used when they slept there at night. There was also evidence that on occasion, some of those people had been compensated with free liquor for cleaning the vacant lot. The police frequently had removed from the area people too drunk to care for themselves.

In addition to testimony concerning the assault and the condition of the site, the plaintiff presented George Rand, an environmental psychologist. Rand testified that he personally examined the location of the assault, the surrounding neighborhood, and, for lack of a better term, the cultural activities and history of the area. He testified that, in his opinion, the physical configuration of the specific site increased the risk of violent crimes between

strangers by creating a "protective" zone that reduced or eliminated visibility and, hence, served as an inducement for crime. He summarized the results of his study by testifying that "I've analyzed the local site, the sub area, the presence of adult entertainment, activities, sexually oriented businesses. I've looked at prior crimes.... The fact that it is an area of the city with a relatively high incidence of crime. And I ... assumed as a result of those observations that there was a persistent and inappropriate use of that site based on the evidence that it was periodically and frequently used by drunks .... There was fighting. Police came. A history of complaints. All those things 752*752 indicate a condition of environmental disorder that I would contend is potentially related to increasing the risk of crime."

Melvin Jetmore, a building official for the city of New London and one of the authors of the housing code, testified for the plaintiff that the site of the defendant's property where the rape had occurred violated the housing code due to the presence of an "obnoxious" overgrowth of sumac trees and brush, and various debris including papers, shingles and broken glass. Jetmore testified that prior to the assault, New London had notified the defendant in March, 1983, and again in February, 1984, of the housing code violations, and that Jetmore had specifically told the defendant to remove all the debris and broken glass and "cut all the bushes and trees down." The defendant, however, did not correct the violations.

The plaintiff also presented conflicting testimony concerning the "purpose" of the pertinent housing code provisions.[1] Jetmore testified that the relevant provisions 753*753 of the city housing code were designed to prevent deterioration and "blight" and to keep property clear of "nuisances and hazards to the safety of occupants, pedestrians and so forth." Further, Robert Finn, a housing code officer for the town of Plainville, testified initially that in his opinion, it was a function of the housing code to eliminate such hazards as "possible places for concealment of criminal activity." On recross-examination, however, Finn contradicted himself, and testified that it was not a purpose of the housing code to prevent the concealment of persons who intend to commit criminal activity. He concluded, "I can't say that those trees should be removed because of an anticipated crime. But, they should be removed because they violate the code."

At the close of the plaintiff's case, the defendant rested without presenting evidence and moved for a directed verdict. The trial court reserved a decision on the defendant's motion. Thereafter, the jury returned a general verdict in favor of the plaintiff, and awarded her $540,000 in damages. The parties did not seek separate verdicts on either count, or request the submission of interrogatories to the jury. Subsequently, however, the trial court set aside the verdict on the defendant's motion. In setting aside the verdict, the trial court first observed that "[w]ithout the shielding [of the overgrowth], the rape most probably would not have occurred [on the defendant's property]." The court implicitly found that the defendant owed the plaintiff a duty of reasonable care, stating that, "[i]n the neighborhood described in the present case, a trier of fact may ... find the occurrence of violence reasonably foreseeable in such a sheltered location to be perpetrated by someone lying in ambush or by someone also using the public right of way who harbors an intent to drag into concealment and out of public view some other party also using the public right of way to inflict 754*754 harm." It also found that the "breach of duty whether common law or statutory or the creating or permitting of a public nuisance was the position of the sumac bush."

Despite finding a legally cognizable duty and a breach of that duty, the trial court nevertheless ruled that "the shielded bushing did not cause the injury. The rape and assault caused the injury and damages." "That shielding [which was described as the building, a retaining wall and sumac trees and/or bushes] could have been provided in that same place and time by some other validly positioned or placed apurtenance." The court concluded, therefore, that as a matter of law, the jury could not find that the defendant's maintenance of overgrowth on his property was a "substantial factor" in producing the plaintiff's injuries and, hence, the plaintiff had failed to establish proximate cause.

I […]

The "scope of the risk" analysis of "proximate cause" similarly applies where, as here, the risk of harm created by the defendant's negligence allegedly extends to an intervening criminal act by a third party. See Tetro v. Stratford, supra, 605; Coburn v. Lenox Homes, Inc., supra. "We have consistently adhered to the standard of 2 Restatement (Second), Torts § 442B (1965) that a negligent defendant, whose conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, is not relieved from liability by the intervention of another person, except where the harm is intentionally caused by the third person and is not within the scope of the risk created by the defendant's conduct. Kiniry v. Danbury Hospital, 183 Conn. 448, 455, 439 A.2d 408 (1981); Merhi v. Becker, [supra, 522]; Miranti v. Brookside Shopping Center, Inc., 159 Conn. 24, 28, 266 A.2d 370 (1969)." (Emphasis added.) Tetro v. Stratford, supra. "The reason [for the general rule precluding liability where the intervening act is intentional or criminal] is that in such a case the third person has deliberately assumed control of the situation, and all responsibility for the consequences of his act is shifted to him." 2 Restatement (Second), Torts § 442B, comment c. "Such tortious or criminal acts may in themselves be foreseeable, [however,] and so within the scope of the created risk...." Id.; see also 2 Restatement (Second), Torts §§ 448 and 449.[5]

760*760 C

Applying these principles, we first note that the defendant has not argued that his conduct was not a "cause in fact" of the plaintiff's injuries. The trial court found that the sexual assault most probably would not have occurred where it actually occurred had the overgrown vegetation not been present. The court also found that the jury could have found from the evidence that the rapist "by design and plan premeditated that the sexual assault would occur in that exact location." Further, there was evidence from which the jury could reasonably have found that the assault would not have lasted thirty minutes absent the shielding provided by the overgrowth. "The conception of causation in fact extends not only to positive acts and active physical forces, but also to pre-existing passive conditions which have played a ... part in bringing about the event." W. Prosser & W. Keeton, supra, p. 265. Under the circumstances, we have no reason to question the trial court's finding that the injury would not have occurred, where it actually occurred, were it not for the shielding created by the overgrowth. Boehm v. Kish, supra; Kowal v. Hofher, supra.

We disagree with the plaintiff, however, that there was room for reasonable disagreement over the question whether the condition on the defendant's property proximately caused her injuries. Trzcinski v. Richey, supra. The plaintiff argues that there was sufficient evidence for the jury to find that the impaired visibility created by the overgrowth, in conjunction with the manner in which the defendant's property was used 761*761 and the unseemly character of the neighborhood, increased the risk of violent crime between strangers. She claims, therefore, that under § 442B of the Restatement, the assailant's act was within the "scope of the risk" created by the condition of the defendant's property. We are persuaded, however, that the plaintiff's application of § 442B of the Restatement is unduly broad. Contrary to her assertion, the harm she suffered cannot reasonably be understood as within the scope of the risk created by the defendant's conduct. We reach this conclusion on the basis of the applicable standards established in our cases as well as by reference to factually analogous precedents.

First, we decline to accept the plaintiff's argument suggesting that it was within the "scope of the risk" that the condition of the defendant's land might catalyze a criminal assault. The plaintiff presented expert testimony that conditions of "environmental disorder," such as those present on the defendant's property and within the surrounding neighborhood, stood in a direct and positive relationship with an increased risk of violent crimes between strangers. She also presented evidence tending to indicate that the assailant had planned the crime around the site. Thus, the plaintiff's theory of liability turns in part on the argument that because the overgrowth was instrumental, in a psychological and sociological sense, in fostering the criminal act, the defendant should be held liable.

This argument envisages the rapist's conduct as a "dependent intervening force"; that is, a predictable response or "reaction to the stimulus of a situation for which the actor has made himself responsible by his negligent conduct." 2 Restatement (Second), Torts § 441, comment c. This position is untenable. First, it is clear that § 442B contemplates reasonably foreseeable intervening misconduct, rather than all conduct that actually proceeds from a situation created by the 762*762 defendant. Coburn v. Lenox Homes, Inc., supra, 375, 384. We are not persuaded that a landowner should reasonably foresee that a condition on his property such as overgrown vegetation might provide a substantial incentive or inducement for the commission of a violent criminal assault between strangers. This is true although once such an incident does occur, it necessarily "could" have occurred. Violent crimes are actuated by a host of social and psychological factors. Although, as a matter of fact, it may be true that one of those actuating factors is mere opportunity for concealment, common experience informs us that such a factor is at most incidental. A prudent person who owns land abutting a public way would not, in our opinion, infer from his ordinary experience the possibility that overgrown vegetation will prompt or catalyze a violent criminal act. This theory ascribes far too much speculative imagination to a "reasonable" or "prudent" person. A person of ordinary caution is not required to be accomplished at making such recondite associations.

Moreover, in the present case, there was no evidence tending to demonstrate that the defendant had had any past experience that might reasonably have led him to perceive and act on the atypical association between "natural shields" such as overgrown vegetation and violent criminal activity. Indeed, the evidence showed that the prior "criminal activity" occurring in the vacant lot abutting his property and the scene of the crime generally was nonviolent, involving vagrancy and the public consumption of alcohol. The plaintiff has not directed our attention to evidence that any of the individuals who frequented the vacant lot threatened or assaulted any passersby or local residents, except to the extent that their mere presence and appearance was "threatening." Moreover, evidence that the defendant's mother had been robbed in the liquor store on the defendant's premises, and that a rape had 763*763 occurred in a nearby building more than two months prior to the assault on the plaintiff, does not require a different conclusion. Both incidents occurred indoors. The fact that criminals will rob liquor stores is an unfortunate, but not extraordinary, fact of contemporary life, and cannot reasonably be seen as exciting the imagination of a prudent person to suppose that a violent sexual crime will occur behind nearby overgrown vegetation in the area of a vacant lot. Further, even if it is assumed that the defendant knew or should have known of the rape in the nearby building, the plaintiff has not presented evidence demonstrating anything distinctive about that inherently atrocious incident that might be reasonably understood as eliciting the type of sensitivity for which she would now hold the defendant accountable. In addition, that experts in environmental psychology such as

George Rand are attuned to the association between conditions of "environmental disorder," such as overgrown vegetation in a poor neighborhood, and crime is surely a product of special training, knowledge, interest and, especially, perspective.

Further, the theory of "catalyst" liability suggested by the plaintiff is far too ambitious. We are persuaded that such a principle would eliminate the role of "proximate cause" in "shaping rules which are feasible to administer, and yield a workable degree of certainty." Kowal v. Hofher, supra, 359-60. Indeed, under this principle, for example, parents of a violent adult child might well be held liable to third persons injured by that child's crime if the victim only establishes a positive relationship between the parents' poor parenting skills and the child's violence. We have little doubt that, in any particular case, such a victim could establish a "cause in fact" in such a case. This hypothetical illustrates the fundamental weakness of the plaintiff's position: it renders "proximate cause" coextensive with 764*764 "cause in fact." "Proximate cause," however, deals with liability, not physics. W. Prosser & W. Keeton, supra, p. 302.

No different result ensues from the plaintiff's less dramatic argument that the condition on the defendant's property, in connection with the "socio-chemistry" of the area, created a foreseeable "opportunity" for the commission of a violent crime and, hence, the harm inflicted on the plaintiff was within the "scope of the risk." Our cases make it clear that, to be within the "scope of the risk," the harm actually suffered must be of the same "general type" as that which makes the defendant's conduct negligent in the first instance. Coburn v. Lenox Homes, Inc., supra. It is unexceptional to impose upon a landowner liability resulting from injuries caused directly and without intervening criminal conduct by "dangerous conditions" on the land. Thus, where the plaintiff stumbles on accumulated debris on the defendant's land, and injures himself, the defendant may be liable. Miranti v. Brookside Shopping Center, Inc., supra. We are not prepared, however, to extend the scope of the foreseeable risk presented by "obnoxious overgrowth" or accumulated debris beyond injury produced by physical contact with such conditions. Thus, the harm suffered by the plaintiff in this case was not of the same general type that allegedly made the defendant negligent.

Even if liability could extend beyond injury caused by physical contact with "dangerous conditions" on a defendant's property, the relationship between the "opportunity" of shielding and the plaintiff's harm in this case was accidental. As the trial court found, there could have been any number of natural or nonnatural conditions on the defendant's property that would have shielded the assault. We do not understand the plaintiff to contend that every conceivable item that could have shielded the occurrence of a violent crime should 765*765 be deemed a basis for negligence because of the potential for crime endemic in an urban neighborhood. Indeed, although there was evidence that the "overgrowth" violated the New London housing code because it created the appearance of "blight," the plaintiff does not bring to our attention any testimony, or any provision of the housing code, that demonstrates that the code would prohibit the maintenance of neatly trimmed vegetation, such as a hedge, that also could serve to screen the commission of a violent crime. Further, we would be offending common sense if we failed to recognize that the objects in the world behind which a criminal act may be concealed are manifold. The plaintiff, therefore, has not established a necessary relationship between the defendant's negligence—that is, the maintenance of overgrown vegetation—and the "causative force" or shielding. Thus, she has failed to remove the issue of causation from the realm of speculation and conjecture. Cf. Pisel v. Stamford Hospital, 180 Conn. 314, 341-42, 430 A.2d 1 (1980).

Our conclusion is supported by many cases in which we have declined to hold that the defendant's conduct in contributing to the harm, principally caused "in fact" by another person or force, was a "proximate cause" of the harm. […]

Our subsequent adoption of § 442B of the Restatement in Miranti v. Brookside Shopping Center, Inc., supra, does not undermine the value of these prior precedents. In Cardona v. Valentin, 160 Conn. 18, 20-21, 273 A.2d 697 (1970), decided after Miranti, the defendant was the owner of a pool hall. The pool hall manager, Morales, got into a fist fight with the plaintiff's decedent, Cardona, a customer who refused to pay. The owner interceded and broke up the fight. As the owner escorted Cardona out of the pool hall, however, Cardona's brother Angel and his friends entered the pool room and began to throw various objects. In the ensuing fight, Morales stabbed and killed Cardona. The decedent's father brought an action against the 767*767 pool hall owner, alleging, inter alia, negligence in his failure to hire adequate security. Id., 23. The trial court found, however, that even if the defendant had been negligent, his negligence was not the proximate cause of Cardona's death. On appeal, we applied § 442B of the Restatement, and held that "the court could reasonably conclude that the actions of Angel Cardona and his friends were the proximate cause of the death rather than any alleged negligence on the part of the defendant...." Id., 25. Thus, in Cardona, we assumed that the defendant had been negligent in creating a condition that constituted a "cause in fact" of Cardona's death, and yet we nevertheless upheld the trial court's determination that the intervening intentional misconduct of Angel Cardona, who instigated the second brawl, superseded the defendant's negligence. Cardona reflects, therefore, that our "fair judgment and ... sense of justice"; Boehm v. Kish, supra; in applying § 442B requires a fairly strong degree of certainty that a criminal or intentional intervening act is within

the "scope of the risk" of a negligent actor's conduct. See also 2 Restatement (Second), Torts § 442B, comment c, illus. 7.

Miranti v. Brookside Shopping Center, Inc., supra, on which the plaintiff places much reliance, is factually dissimilar to the present case. In Miranti, the plaintiff, a fifteen year old boy, was chased and knocked down by a dog, and fell over an accumulation of trash and debris on property alleged to be under the control of the defendants. The trial court, concluding that the proximate cause of the fall and resulting injury was solely the action of the dog in knocking the plaintiff down rather than the accumulation of trash and debris, rendered judgment for the defendants on their motion for summary judgment. We reversed, holding that the pleadings raised contested issues as to whether an accumulation of trash and debris did, in fact, exist, and, 768*768 if it did, as to whether it created a condition productive of a foreseeable harm of the general nature of that suffered by the plaintiff, and as to which the defendants could be held legally responsible for the condition in any one or more of the ways claimed by the plaintiff. Unlike Miranti, where the plaintiff was injured when he fell over the trash and debris on the defendants' property, in this case the plaintiff was injured by the criminal act of her abductor. The sumac trees, the bushes, debris or litter on the defendant's property did not injure the plaintiff. Nor, unlike Miranti, does the "scope of the risk" presented by the "dangerous" condition on the defendant's property extend to the harm of the general nature suffered by the plaintiff.
[…]

There is no error.
In this opinion the other justices concurred.
[…]
[…]
[…]

20.2.2

Yun v. Ford Motor Co., 674 A.2d 841 (N.J. App. 1994)

The opinion of the court was delivered by VILLANUEVA, J.A.D.

Plaintiffs Gloria Yun (as administrator ad prosequendum of the estate of Chang Hak Yun)[2] and Nam Yi Yun, the decedent's widow,[3] appeal from a summary judgment dismissing their claims against defendants Ford Motor Company (Ford), Castle Ford (Castle), Universal Motor Coach (Universal), Kim's Mobile Service Center, Inc. (Kim) and Miller Manufacturing Corporation (Miller).

Chang Hak Yun (Chang) was struck by an automobile on the Garden State Parkway while retrieving a spare tire that had fallen off of a Ford van in which he was a passenger. Approximately seven months later, he died of the injuries sustained. Plaintiffs brought suit against the defendants, claiming that the apparatus connecting the spare tire to the rear of the van was defective. Also named as defendants were Precious and Charles Linderman, the driver and owner, respectively, of the other automobile, who are not parties to this appeal. On June 9, 1992, a voluntary dismissal was filed as to Gloria Yun, individually, Pyong Ok Hwang and Yun Cho Shim, Chang's children.

147*147 Plaintiffs claimed that the accident was a result of the "negligent manufacture, distribution, service and/or warranty" of the van and its parts by Ford, the manufacturer, and Castle, the dealership. Plaintiffs amended their complaint to add defendants Universal and Kim. Plaintiffs alleged that Universal was "responsible for the [negligent] installation, assembly, manufacture and/or distribution of a conversion kit to the defectively manufactured 1987 Ford [v]an." Plaintiffs contended that Kim had "improperly serviced the 1987 van and caused a hazardous condition to occur." In their third amended complaint plaintiffs alleged that Miller was "responsible for the [defective] manufacture of the spare tire carrier."

Ford, Castle, Universal, Kim and Miller moved for summary judgment to dismiss the complaint. In granting the defendants' motions by order dated September 30, 1992, the Law Division found as a matter of law that there was no proof of proximate cause and that the actions of Chang in seeking to retrieve the spare tire and assembly and that of the driver of the automobile that struck him broke the causal chain. The plaintiffs' complaint against defendants Precious and Charles Linderman was not dismissed because these defendants did not move for summary judgment.

On February 17, 1993, the assignment judge entered an order of dismissal with prejudice. The order notes that counsel represented to the court that the "within cause has been settled." Plaintiffs' action against the Lindermans was settled in March 1993.

I.

On November 27, 1988, between 11:10 p.m. and 11:40 p.m., Chang was a passenger in a 1987 Ford van owned and driven by his daughter, Yun Cho Shim (Yun), northbound in the local lanes of the Garden State Parkway (Parkway). While driving on the Parkway returning from Atlantic City, Yun heard a "rattling type" noise coming from the rear of the van. According to the plaintiffs, at approximately mile post 50.8 the plastic cover and spare tire 148*148 and part of the support bracket which was screwed to the rear of the van, landed directly behind

Yun's van and then rolled across both lanes of traffic or were pushed there by another vehicle, ultimately coming to a rest against the wooden guard rail separating the Parkway lanes.

Yun safely drove the van onto the right berm of the highway and stopped. Chang, a rear seat passenger who was sixty-five years old at the time, exited the vehicle, then ran across two lanes of the dark, rain-slicked Parkway and retrieved the spare tire and some of the other parts. During the course of returning back to the Ford van across the Parkway, Chang was struck by the vehicle operated by defendant Precious Linderman. Precious Linderman had been driving northbound in the right lane when she saw and struck Chang as he was crossing the Parkway. After the initial impact, Linderman's vehicle slid on the wet road and struck Chang a second time. Chang died seven months later following a period in which he remained comatose.

After Ford manufactured the van, it was sent to Universal where its chassis was converted and the spare tire assembly installed before it was shipped to Castle. Yun purchased the van from Castle in its completed state. Although the record is not clear, it appears that Miller manufactured the spare tire assembly alleged to have been defective.

On October 27, 1988, approximately one month prior to the subject accident, defendant Kim had serviced the Ford van. According to Kim, Yun and Chang had brought the van to Kim for an oil change and a tune up. Kim changed the oil but advised Chang and his daughter that a tune-up was not necessary. However, Kim also advised them that the front driver's side tire was extremely bald and should not be driven in that condition. Consequently, Chang and his daughter requested Kim to change the tire with the spare located in the bracket on the outside rear of the van. Kim removed the spare tire from the bracket and used it to replace the worn left front tire. Kim thereafter placed the worn tire in the bracket and secured it.

149*149 Additionally, Chang and Yun advised Kim that the bracket holding the spare tire was damaged, "bent down," apparently as a result of a motor vehicle accident that occurred several months earlier. Chang and Yun told Kim not to repair same, because they knew where to get the parts and that it was going to be repaired by the dealer and handled through the insurance company of the other driver who was involved in that motor vehicle accident. Kim's work order receipt notes "Bra[c]ket Bent down."

Shortly after the accident, on behalf of plaintiffs, Seymour S. Bodner, a consulting engineer, examined the van and the remains of the spare tire assembly. He opined that the bracket frame remained secured to the van's left rear door at its three attachment areas but a portion of the mounting bracket had sheared off from the assembly. Bodner concluded that an aluminum strap, which secured the attached spare tire, was defectively welded to the bracket frame. Consequently, the lower portion of the strap separated from its attachment to the bracket. The resulting "fatigue failure" of the strap then caused it to fracture with only a small portion remaining attached to the bracket.

II.

With a broad brush, plaintiffs seek to reverse the summary judgment granted to all defendants except Lindermans. Plaintiffs in their appellate argument do not even mention any of the defendants by name or capacity, rather they assert that the issue of proximate cause is a question for the jury.

Plaintiffs abandoned their claim against Ford apparently because the evidence showed that the spare tire assembly was not part of the vehicle when it left Ford's factory. […]

III.

Kim, in its motion for summary judgment, relied upon the lack of proximate cause argument made by the other defendants but also asserted that there was no legal basis for plaintiffs' claim against Kim. Furthermore, plaintiffs' expert did not impute any negligence against Kim. Rather, he opined that the defect was weld failure with which Kim had nothing to do.

Kim alerted Chang and Yun to the problem but Chang and Yun told Kim that they did not want Kim to repair it. Kim had no duty to repair and therefore did not breach any duty. Weinberg v. Dinger, 106 N.J. 469, 484, 524 A.2d 366 (1987). An order or judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it. Isko v. Planning Board of Tp. of Livingston, 51 N.J. 162, 175, 238 A.2d 457 (1968); Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78, 628 A.2d 793 (App.Div. 1993). This is true even if the judge erroneously declined to reach the merits of the issue. Liebeskind v. Mayor and Mun. Council, 265 N.J. Super. 389, 400, 627 A.2d 677 (App. Div. 1993).

IV.

Because the initial complaint was filed on May 17, 1990, it falls within the scope of the Products Liability Act, N.J.S.A. 2A:58C-1 to -7 (hereinafter the "Act"). The Act defines a "product liability action" as:

> a claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.

N.J.S.A. 2A:58C-1(b)(3).

An action under the Act parallels that of a claim under common law strict liability. Specifically, the Act requires a claimant 151*151 to prove by a preponderance of the evidence that "the product causing the harm was not reasonably fit, suitable or safe for its intended purpose...." N.J.S.A. 2A:58C-2. The Act does not affect the requirement of causation, which is an essential element of an action based in either strict liability or negligence. See Coffman v. Keene Corp. 133 N.J. 581, 594, 628 A.2d 710 (1993); O'Brien v. Muskin Corp., 94 N.J. 169, 179, 463 A.2d 298 (1983); Weinberg v. Dinger, supra, 106 N.J. at 484, 524 A.2d 366 (a cause of action for negligence requires proof of proximate cause).

Accordingly, plaintiffs must prove that the alleged defect in the spare tire bracket assembly proximately caused the injuries sustained by Chang. Taylor by Wurgaft v. General Elec. Co., 208 N.J. Super. 207, 212, 505 A.2d 190 (App.Div.), certif. denied, 104 N.J. 379, 517 A.2d 388 (1986). Proximate cause is "`any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred.'" Daniel v. State, Dep't of Transp., 239 N.J. Super. 563, 595, 571 A.2d 1329 (App.Div.) (quoting Polyard v. Terry, 160 N.J. Super. 497, 511, 390 A.2d 653 (App.Div. 1978), aff'd o.b., 79 N.J. 547, 401 A.2d 532 (1979)).

Proximate cause has been described as a standard for limiting liability for the consequences of an act based "`upon mixed considerations of logic, common sense, justice, policy and precedent.'" Scafidi v. Seiler, 119 N.J. 93, 101, 574 A.2d 398 (1990) (quoting Caputzal v. The Lindsay Co., 48 N.J. 69, 77-78, 222 A.2d 513 (1966)). Proximate cause "`must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.'" Caputzal, supra, 48 N.J. at 78, 222 A.2d 513. (quotations omitted). Under the most liberal interpretation, conduct constituting proximate cause "need only be a cause which sets off a foreseeable sequence of consequences, unbroken by any superseding cause, and which is a substantial factor in producing the particular injury." Bendar v. Rosen, 247 N.J. Super. 219, 229, 588 A.2d 1264 152*152 (App.Div. 1991). Thus, our focus must be on whether Chang's conduct was reasonably foreseeable versus "highly extraordinary," thereby breaking the chain of causation. See e.g. Morril v. Morril, 104 N.J.L. 557, 558-63, 142 A. 337 (E. & A. 1928) (a landowner did not correct a known defective latch on her garage and her nephew was subsequently injured when the garage door blew open and struck him in the face, resulting in the loss of an eye; in analyzing the proximate cause, the Court found that only "the most vivid imagination" would have comprehended the danger which eventually occurred). Id. at 563, 142 A. 337.

The present case presents extraordinary circumstances. After Ford manufactured a van, spare tire assembly was attached to the van by Universal. Assuming plaintiffs' allegations are true, an alleged defect in the spare tire assembly caused the spare tire and other parts to fall off the van and roll across the Parkway. Because the van in which Chang was travelling came safely to rest at the side of the Parkway, his actions were "highly extraordinary." Chang's attempt to retrieve the parts involved crossing the Parkway in both directions — an activity which cannot be described as anything short of extraordinarily dangerous, if not suicidal, as the action proved. In the process of returning from the middle of the Parkway, Chang was struck by Mrs. Linderman and fatally injured. Although cited in the context of the foreseeability of a person's emotional reaction to a given event, the New Jersey Supreme Court aptly noted in Caputzal, supra:

> "Generally a defendant's standard of conduct is measured by the reaction to be expected of normal persons...."
>
> [Caputzal, supra, 48 N.J. at 76, 222 A.2d 513 (quoting 2 Harper and James, The Law of Torts, § 18.4 at 1035 (1956)).]

Logic and fairness dictate that liability should not extend to injuries received as a result of Chang's senseless decision to cross the Parkway under such dangerous conditions. Common sense should have persuaded Chang, who was only a passenger, to wait for assistance or abandon the bald tire and damaged assembly. The van could have been driven safely home.

153*153 A similar case involving an allegedly defective truck is Peck v. Ford Motor Company, 603 F.2d 1240 (7th Cir.1979). In Peck, the plaintiff brought suit against Ford, the manufacturer of a truck that broke down and was abandoned by its driver in the right lane of traffic on a major highway. Id. at 1241-42. The plaintiff, driving in another truck, collided with the disabled vehicle resulting in serious injuries. Id. at 1242. Ford appealed the jury verdict in favor of the plaintiff against Ford for $500,000.

The Seventh Circuit assumed for the purpose of its analysis that the truck was defective and that the defect caused the truck to stop on the highway. The court then considered whether the plaintiff's collision and resulting injuries were foreseeable consequences of the alleged defect. Plaintiff argued that it was foreseeable to the manufacturer that drivers of its trucks "may not do those things which would prevent [the defendant's] wrong from afflicting injuries." Id. at 1243. The plaintiff further argued that it was foreseeable that a tow truck would not be immediately available to remove a disabled vehicle.

The Seventh Circuit rejected the plaintiff's arguments and held as a matter of law that there was no proximate cause between the plaintiff's injuries and the alleged defect. Id. at 1245-47. In so doing, the Court drew a distinction between a defect which causes immediate harm and one in which a sufficient amount of time has passed to shift the duty to prevent further harm to other actors:

> [T]he defect here did not cause any damage at [the time of failure]. The truck rolled to a stop without incident ... it would appear shortly after the truck came to a stop on the highway and other vehicles in the area had safely cleared the stopped truck, [defendant] had no further duty on the facts of this case to prevent harm. Its tort had "spent its force." That duty had passed to the driver who was clearly in the best position to prevent further harm.

Id. at 1244-45 (footnote omitted).

Likewise herein, the alleged defect in the spare tire assembly did not injure Chang. The driver of the van was able to pull the vehicle to the side of the road safely and without incident. In the words of the Seventh Circuit, the tort with regard to the allegedly defective spare tire bracket had "spent its force." Ibid. Chang's 154*154 injury occurred after he decided to leave the vehicle and cross the Parkway and return where he was struck. At most, the presence of the spare tire created a "condition upon which the subsequent intervening force acted" and in such case there is no proximate cause relationship between the defective product and the injury. Id. at 1245. See Brown v. United States Stove Co., 98 N.J. 155, 172, 484 A.2d 1234 (1984) (finding that remote cause was not a proximate cause, but instead was a condition under which the injury was received).

A tortfeasor will be held responsible for his negligent conduct if it is a "substantial factor" in bringing about plaintiff's injuries. Id. at 171, 484 A.2d 1234. Where, however, concurrent forces are involved, the manufacturer of a defective product may negate strict liability upon a showing of an intervening, superseding cause or the existence of another "sole proximate cause" of the resulting injury. Ibid. (citing Southwire Co. v. Beloit Eastern Corp., 370 F. Supp. 842, 857 n. 21 (E.D.Pa. 1974)). Assuming, arguendo, that the spare tire assembly was a substantial factor in causing Chang's injuries, Chang's highly extraordinary and dangerous actions in crossing the Parkway twice with complete disregard for his own personal safety clearly constitute a superseding and intervening cause of his own injuries.

Thus, "[t]he actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm." Caputzal v. Lindsay Co., 48 N.J. at 78, 222 A.2d 513 (quoting Restatement (Second) of Torts § 435(2) (1965)).

The Supreme Court faced a similar question in Brown. In that case, plaintiff was injured in his employer's garage after a space heater, which had been altered several years earlier, flared up. Id. at 162, 484 A.2d 1234. In Brown, as in the present case, the subsequent negligent acts of other parties independently caused Chang's injuries. Even assuming arguendo that the remaining defendants somehow bear responsibility for the allegedly defective 155*155 spare tire bracket assembly, that responsibility is only remotely connected with the injuries caused to Chang by Mrs. Linderman's vehicle. Moreover, in deciding to cross the Parkway at night, Chang assumed a substantial risk in attempting to retrieve the spare wheel.[4]

A person, such as Chang, "who has indicated by his actions that he has recognized that his conduct runs the risk of a particular danger, will not be permitted to absolve himself from responsibility for an objectively anticipatable injury resulting therefrom." Vallillo v. Muskin, 212 N.J. Super. 155, 162, 514 A.2d 528 (App.Div. 1986). In Vallillo, the plaintiff, an experienced swimmer, brought an action against pool manufacturers for injuries caused when he struck his head on the bottom of a pool. Id. at 157, 514 A.2d 528. Although the case involved a failure to warn claim, we noted plaintiff's decision to assume the risks involved when he dove into the pool:

> Striking one's head on the pool bottom is an obvious result of diving into a shallow pool. Defendants' failure to warn that spinal injuries could result from such a head injury cannot be said to be a proximate cause of plaintiff's diving in conscious disregard of his own safety.
>
> [Id. at 162-63, 514 A.2d 528.]

This reasoning is equally compelling herein. The danger involved in crossing a busy highway at night should be apparent to an adolescent, let alone an adult sixty-five years of age.

The allegedly defective product (the spare tire carrier) did not cause Chang's injuries. Chang's and Yun's joint decision, thirty days before this accident, not to repair the allegedly defective assembly and Chang's flagrant disregard for his personal safety by crossing the Parkway late at night and the injuries he 156*156 received when struck by Linderman's vehicle constitute intervening superseding causes. Logic, common sense, justice and fairness dictate that the alleged product defect was not a proximate cause of Chang's injury.

Usually, the issue of proximate cause is reserved for the jury's determination. Geherty v. Moore, 238 N.J. Super. 463, 478-79, 570 A.2d 29 (App.Div. 1990), appeal dismissed, 127 N.J. 287, 604 A.2d 110 (1991); see also Glaser v. Hackensack Water Co., 49 N.J. Super. 591, 598, 141 A.2d 117 (App.Div. 1958) (stating that a question of proximate cause is usually for the jury "unless the consequences are so highly extraordinary that as a matter of law they cannot be considered natural"). In certain cases, however, the issue of proximate cause has been held so intertwined with issues of policy as to be treated as a matter of law for the court to determine. Caputzal, supra, 48 N.J. at 78-79, 222 A.2d 513. This is especially true where the manner or type of harm caused to the plaintiff is unexpected. As the Supreme Court stated in Caputzal: "[t]he idea of nonliability for the highly extraordinary consequence as a question of law for the court has already been recognized in this state." Id. at 78, 222 A.2d 513; accord Lutz v. Westwood Transportation Co., 31 N.J. Super. 285, 290, 106 A.2d 329 (App. Div.), certif. denied, 16 N.J. 205, 108 A.2d 120 (1954). This position is consistent with that of the Restatement (Second) Torts § 435(2) (1965):

> The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.

For cases citing the Restatement (Second) Torts § 435(2) see Caputzal, supra, 48 N.J. at 78, 222 A.2d 513; Dwyer v. Erie Investment Co., 138 N.J. Super. 93, 101, 350 A.2d 268 (App.Div. 1975) certif. denied, 70 N.J. 142, 358 A.2d 189 (1976).

In Caputzal, plaintiff purchased a water softener for his home which was manufactured, sold and installed by the defendants. Caputzal, supra, 48 N.J. at 71, 222 A.2d 513. Approximately two weeks later, the plaintiff made coffee using the "softened water" 157*157 without any ill effect. Id. at 71-72, 222 A.2d 513. Plaintiff subsequently discovered that the water coming out of the water tap was a brownish, rusty color, became distraught at the thought of having consumed the brackish water and suffered a heart attack. Id. at 72, 222 A.2d 513.

The trial court granted summary judgment in favor of the manufacturer which was subsequently affirmed by the Supreme Court. Id. at 77, 222 A.2d 513. Noting that the concept of proximate cause is an instrument of fairness and policy, the Supreme Court concluded that the plaintiff's heart attack was too unusual and extraordinary a result of defendants' acts or omissions to constitute legal cause. Id. at 79, 222 A.2d 513. The Court noted that:

> "[A]s a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability."
>
> [Id. at 78, 222 A.2d 513 (quoting Prosser, Torts, § 30, at 146 (3rd ed. 1964))].

In Jensen v. Schooley's Mountain Inn, 216 N.J. Super. 79, 522 A.2d 1043 (App.Div.), certif. denied, 108 N.J. 181, 528 A.2d 11 (1987), the defendant bar served alcoholic beverages to Jensen while he allegedly was visibly intoxicated. After leaving the bar, Jensen drove eight miles, where he "parked his car and, for some unknown reason, began climbing a tree." Id. 216 N.J. Super. at 80, 522 A.2d 1043. The branches of the tree apparently could not support Jensen's weight and one broke, causing Jensen to fall twenty feet to the river bank. Jensen either fell or rolled into the river and drowned. Accepting as true plaintiffs' allegations that the defendant negligently and wrongfully served Jensen, we nonetheless affirmed the trial court's granting of summary judgment in favor of the defendant. We stressed:

> [L]egal responsibility for the consequences of an act cannot be imposed without limit. The events here transgress the judicial line beyond which liability should not be extended as a matter of fairness or policy.
>
> [Id. at 82, 522 A.2d 1043 (citations omitted).]

That principle is equally applicable herein. It was not reasonably foreseeable to defendants that if the spare wheel assembly 158*158 was defective, and the driver-owner of the car and Chang refused to have it repaired and later while they were driving on the Parkway at night, it fell off but they safely brought the car to a stop on a berm, that Chang would then violate the law by twice crossing the Parkway to go to the median to retrieve the parts and be killed by a passing car. Furthermore, reasonable people could not differ that the continued driving for thirty days with knowledge of the defect and the senseless, and illegal crossing of the Parkway were intervening superseding causes of the accident which broke the chain of causation.

Affirmed.

BAIME, J.A.D., concurring and dissenting.

I agree that the judgment in favor of Ford Motor Company should be affirmed because plaintiffs offered no opposition to that defendant's motion for a dismissal of the complaint. See Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75, 110 A.2d 24 (1954); Infante v. Gottesman, 233 N.J. Super. 310, 318-19, 558 A.2d 1338 (App.Div. 1989); Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230, 234, 542 A.2d 34 (App.Div.), certif. denied, 113 N.J. 353, 550 A.2d 463 (1988); Burlington County Welfare Bd. v. Stanley, 214 N.J. Super. 615, 622, 520 A.2d 813 (App.Div. 1987). So too, my careful review of the record fails to disclose facts sufficient to support a negligence claim against Kim's Mobile Service Center. Consequently, the judgment in favor of that defendant should also be affirmed. See Judson v. Peoples Bank and Trust Co., 17 N.J. at 75, 110 A.2d 24. However, I part company with my colleagues in their affirmance of the Law Division's judgment as to the remaining defendants. I believe that plaintiff's submissions relating to proximate cause were sufficient to defeat the defendants' motion for summary judgment.
[…]

20.2.3

Hall v. Millersville University, 400 F.Supp.3d 252 (2019)

400 F.Supp.3d 252 (2019)

John J. HALL and Jeanette A. Hall, as Administrators and Personal Representatives of the Estate of Karlie A. Hall, and in their own right as Decedent's heirs-at-law, Plaintiffs,

v.

MILLERSVILLE UNIVERSITY, Sara Wiberg, Individually and as an Employee of Millersville University, Acacia National Fraternity, Acacia Fraternity Chapter Number 84, Colin Herbine, Individually and as an Agent of Acacia National Fraternity and Acacia Fraternity Chapter No. 84, Jack Milito, Individually and as an Agent of Acacia National Fraternity and Acacia Fraternity Chapter No. 84, Nicholas Hench, Individually and as an Agent of Acacia National Fraternity and Acacia Fraternity Chapter No. 84, Sean Ebert, Individually and as an Agent of Acacia National Fraternity and Acacia Fraternity Chapter No. 84, Nigale Quiles, Individually and as an Agent of Acacia National Fraternity and Acacia Fraternity Chapter No. 84; and John Does #1-5, Individually and as Agents of Acacia National Fraternity and Acacia Fraternity Chapter No. 84, Defendants.

CIVIL ACTION No. 17-220.

United States District Court, E.D. Pennsylvania.

Filed September 5, 2019.

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MEMORANDUM OPINION

SMITH, District Judge.

This tragic case arises from a man's brutal murder of his 18-year-old girlfriend in her university dorm room after they attended a fraternity party together. The victim's parents attribute some responsibility for the murder to the university, the local fraternity chapter and certain of its members who hosted the party their daughter and her boyfriend attended, and that chapter's national fraternal organization. […]
[…] […]

II. FACTUAL BACKGROUND[4]

A. Karlie Begins a Relationship with Gregorio Orrostieta, whom She Continues Dating at Millersville

Karlie met and began dating Gregorio Orrostieta ("Orrostieta") in March 2014, towards the end of her senior year of high school. […] On one occasion, Karlie was in the shower when her twin sister, Kristen Hall ("Kristen"), heard Orrostieta screaming at her about text messages she had sent. […] At one point during the fight, Kristen

heard Karlie yell, "you hit me." Millersville SOF at […] Kristen does not recall whether she ever discussed the fight with Karlie. […]
At another point that summer, Orrostieta and Karlie were locked in a room during a party at the Hall home, when Kristen heard "a lot of banging," which worried her. […] Kristen did not discuss the incident with Karlie or their mother. […]

B. The October 4-5, 2014 Incident[5]

On October 4, 2014, Karlie and Orrostieta returned to her room from a party, at which time Karlie's roommate, Tina Flexer ("Tina"), noticed Karlie was crying. […] Karlie then left the room and went to the bathroom. Dep. of Tina Flexer ("Tina Dep.") at 46:14-23, Doc. No. 147-8. Tina left the room and ran into Karlie in the hallway, at which point she told Tina that she had had a verbal fight with Orrostieta. […]
[…]
Wiberg testified that when she approached Karlie, she saw her face was "red and puffy" as if she had been crying, but she did not see any physical injuries. […] Tina testified she and Wiberg both observed an injury to Karlie's eye and that they got an ice pack to put on Karlie's face. […] Karlie then told Wiberg that she wanted Orrostieta to leave but would not say anything else. […] In the hallway, Orrostieta begged Wiberg to allow him to stay, but as Karlie had said she wanted him to leave, he could no longer be her guest, so Wiberg called the police. […]
Officer Brian Liddick of the Millersville University Police responded to a call for "subject refusing to leave campus." […] Officer Liddick drove Orrostieta to a nearby gas station, where a friend had agreed to pick him up.
[…]
[…]

C. Tina's Description of the Incident to Her Mother and Her Mother's Subsequent Calls to Millersville

Tina called her mother, Renea Flexer ("Renea"), to describe the incident the next day, because she was concerned about Karlie and believed that Orrostieta may have hit her. […] Renea 262*262 called the Millersville University Police, the Millersville Counseling Department, and Area Coordinator Allie Sehl to report that her daughter told her that her roommate's boyfriend had given her a black eye, but they all said there was nothing they could do without a complaining witness. […]

D. Karlie and Orrostieta Attend a Fraternity Party at Acacia Chapter 28 on February 7-8, 2015

From the night of February 7, 2015, to the early morning hours of February 8, 2015, Karlie and Orrostieta attended a party with a group of friends, including Karlie's sister, Kristen. […] Members of one of Millersville's fraternities, Acacia Chapter 84, hosted the party at their house, which was decorated with Acacia paraphernalia and symbols and known locally as the "Acacia House." […] Witnesses testified that Karlie and Orrostieta purchased cups at the party for $5, which would allow them to consume alcohol while there. Pls.' Resp. to Chapter 84 SOF at ¶ 10.
After arriving at the party, one member of Karlie's friend group, Kyle Smith ("Smith"), witnessed Orrostieta "viciously" yell at Karlie, point his finger in front of her face, and then "push her into the wall pretty hard" before walking away. […] He did not know whether anyone else witnessed the altercation and did not tell any members of Chapter 84 what he had seen, including any of the "sober brothers" who were tasked with monitoring the party.
[…] Smith further testified that he made sure to check on Karlie before he left the party, and after he saw her and Orrostieta dancing together 263*263 he assumed "everything's good." […]

E. Orrostieta Murders Karlie in Her Dorm Room

After Karlie and Orrostieta returned to Karlie's dorm room, Karlie's neighbors reported to Wiberg that they heard furniture being moved in Karlie's room. […] Another student in a room next door reported to the police after the murder that he and a friend heard a "loud bump" that shook the wall, which was loud enough that another neighbor knocked on his friend's door to ask whether they had heard the noise as well. […] […] They all then "heard the girl screaming for help." *Id.* Wiberg knocked on the door but heard nothing and did not pursue the matter further. […] Orrostieta had killed Karlie through "strangulation and multiple traumatic injuries," and he potentially sexually assaulted her. […] He was later convicted of third-degree murder. […]

[…]

III. DISCUSSION

A. Standard of Review — Motions for Summary Judgment

A district court "shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." […]

B. Acacia

1. Existence of a Duty

Generally, a social host in Pennsylvania who serves alcohol to an intoxicated person is not liable for any damages that intoxication causes, whether to the intoxicated person herself or to a third-party. *See* *Klein v. Raysinger,* 504 Pa. 141,470 A.2d 507, 510-11 (1983) ("We agree with this common law view, and consequently hold that there can be no liability on the part of a social host who serves alcoholic beverages to his or her adult guests."). Under this social host doctrine,[9] however, an exception applies where the intoxicated person is a minor. […]
In *Alumni Association v. Sullivan* ("*Sullivan*"), the plaintiff sought to extend the Social Host Doctrine established in *Congini* to hold that a national fraternity 266*266 had a duty to "monitor the activities of its Chapters," and was therefore responsible for damage an intoxicated minor caused after being served alcohol at a chapter house. […] In that case, a minor who set fire to a neighboring house sought to file a joinder complaint against the university, as well as the national fraternity and fraternity chapter where he had consumed alcohol earlier in the night. *Id.* at 1209-10. The Court held that the national fraternity had no duty to the party guest, even though it purportedly owned the property where the party occurred, because there were "no allegations the fraternity had actual knowledge of the activities allegedly occurring at the local chapter or of the ability of the national body to control said activities." *I [...]*

The plaintiffs do not dispute that *Sullivan* held that national fraternities are not liable under the Social Host Doctrine but argue that this case is distinguishable because, here, Acacia chose to engage with Chapter 84 more closely than in a typical national fraternity-local chapter relationship. […] Specifically, the plaintiffs assert that Acacia's decision to work with Chapter 84 after its 2011 deactivation meant that it "assumed a duty to ensure no harm came from Chapter 84's conduct and concurrently assumed the role of principal in an agency relationship that will see them vicariously liable for Chapter 84's misconduct." […]
But nothing in either *Sullivan* or *Millard* invites the case-by-case inquiry into the relationship between each individual chapter and its national entity that the plaintiffs seek.[11] In *Sullivan,* the Court held that "[t]he national organization in fraternal groups has only the power to discipline an errant chapter after the fact," not merely that the particular defendant had no such power. […]
The plaintiffs here seem to argue that unlike in *Millard,* Acacia had reason to know that Chapter 84 was not complying with the Risk Management Policy because of the 2011 party that led to its deactivation and updates it received from Chapter 84 in the months before Karlie's death. Specifically, they point to Chapter 84 member Kevin Mynaugh's ("Mynaugh") statement in a monthly report to Acacia for August/September 2014 that the Chapter "fe[lt] as a Fraternity that the way we had been running things w[as] not safe for us as a Fraternity and the people who were involved outside of the Fraternity." […] But the *Sullivan* Court explicitly rejected the plaintiff's argument that a social host may be held liable if it "knew or *should have known*" minors were being served alcohol, holding instead that "[t]he `knowingly furnished' standard requires actual knowledge on the part of the social host as opposed to imputed knowledge imposed as a result of the relationship." 572 A.2d at 1212. It is not enough to suspect that minors are being served alcohol; rather, the defendant "must have `intentionally and substantially aided and encouraged the consumption of alcohol by a minor guest. . . .'" *Id.* […]
[…]

2. Proximate Cause

Even if Acacia had a duty to Chapter 84's party guests, the facts here 273*273 would not support a finding of proximate cause. […]

In Pennsylvania, courts use the Restatement (Second) of Torts' "substantial factor" test to determine whether proximate cause exists. *Ford v. Jeffries,* 474 Pa. 588, 379 A.2d 111, 114 (1977) (citing to Restatement (Second) of Torts § 431). When determining whether negligent conduct is a substantial factor in producing the injury,

> [t]he following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:
>
> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
>
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; [and]
>
> (c) lapse of time.

Restatement (Second) of Torts § 433 ("section 433"). Whether a third party's conduct breaks the chain of causation depends on whether the conduct amounted to a superseding cause, or a mere intervening force. "A superseding cause is an act of a third person or other force which, by its intervention, prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Von der Heide v. Com., Dep't of Transp.,* 553 Pa. 120, 718 A.2d 286, 288 (1998) (quoting Restatement (Second) of Torts § 440 and citing *Trude v. Martin,* 442 Pa.Super. 614, 660 A.2d 626, 632 (1995)). To determine whether a subsequent occurrence is an intervening or superseding cause, courts consider "whether the force is operating independently of any situation created by the first actor's negligence and whether it is a normal result of that situation." *Trude,* 660 A.2d at 632 (citations omitted). Not every third-party criminal act is a superseding cause. "[T]he proper focus is not on the criminal nature of the negligent act, but instead on whether the act was so extraordinary as not to be reasonably foreseeable." *Powell v. Drumheller,* 539 Pa. 484, 653 A.2d 619, 624 (1995).

In *Heeter,* the Third Circuit applied section 433 to affirm the district court's holding that there was no proximate cause where the plaintiff alleged that the failure of the alarm system she purchased from the defendants allowed an intruder to steal firearms from her home, which he then used to murder her son in a different location. 706 F. App'x at 65. The plaintiff told the defendants when discussing potentially purchasing an alarm system that she was concerned about a neighbor, the eventual intruder and murderer, who had a "tortured past" and a "conscious disregard for the well-being of others and in particular, her son, Bryan Harris." *Id.* (quoting case record). In response, the defendants confirmed that the alarm system would alert her immediately if there was a break-in, and the plaintiff agreed to purchase the system. *Id.* Despite those assurances, the neighbor was able to break into the home, disable the alarm, and steal the plaintiffs' 274*274 firearms, without the plaintiff receiving any notification. *Id.*

The Third Circuit agreed that all three section 433 factors weighed against the existence of proximate cause. First, "myriad other matters[—all relating to the decisions the murderer had made—]had a far greater effect on the murder of Harris than the conduct of the [defendants]." *Id.* at 67; *see also Van Mastrigt,* 393 Pa. Super. at 151, 573 A.2d 1128 (1990) ("None of the defendants put a knife in [the murderer's] hand. None of the defendants were responsible for the act of killing [the victim]. A court determined that [the murderer] alone was responsible for the actual murder of [the victim]."). Second, "[t]he chain of events on the day of Harris's murder did not begin with the faulty alarm system." 706 F. App'x at 67. Finally, the passage of time between the failure of the alarm system and the murder although "not dispositive on its own, . . . work[ed] in concert with the other two considerations to negate proximate cause in this case." *Id.* (citing *Am. Truck Leasing, Inc. v. Thorne Equip. Co.,* 400 Pa.Super. 530, 583 A.2d 1242, 1243-44 (1991)). In addition to these factors, the court noted that the neighbor's conduct "was not foreseeable and constitute[d] a superseding cause. Intervening criminal action is not *per se* superseding, but becomes so when, `looking retrospectively from the harm through the sequence of events by which it was produced, it is so extraordinary as not to have been reasonably foreseeable.'" *Id.* (quoting *Vattimo v. Lower Bucks Hosp., Inc.,* 502 Pa. 241, 465 A.2d 1231, 1237 (1983) and citing *Powell,* 653 A.2d at 624).

[…]

The plaintiffs cite to cases which they assert demonstrate that "Pennsylvania courts have long held that violence and injury, and even criminal misconduct, are foreseeable consequences stemming from the service of alcohol." Acacia Opp. at 24 (citing *Corcoran v. McNeal,* 400 Pa. 14, 161 A.2d 367 (1960) (imposing liability on bar owner for injuries suffered during attack on bar premises during which bar staff repeatedly ignored requests for help); *Schelin v. Goldberg,* 188 Pa.Super. 341, 146 A.2d 648 (1958) (holding bar was subject to Dram Shop liability for overserving patron who caused plaintiff injuries in bar fight); *Rommel v. Schambacher,* 120 Pa. 579,11 A. 779 (1887) (imposing liability on bar owner who saw patron light other patron on fire and "did not interfere to protect his guest from so flagrant an outrage");[17] *Cassaro v.* 275*275 *Zodiac Tour and Travel Inc.,* 4 Pa. D. &

C.4th 132, 138-39 (Lackawanna Ct. Com. Pl. Oct. 10, 1989) (holding proximate cause existed for claims relating to fatal car accident intoxicated minor driver caused); *Walsh v. Murphy,* 40 Pa. D. & C. 3d 98, 102 (Bucks Ct. Com. Pl. 1982) (imposing liability on tavern for stabbing injuries sustained in bar fight, based on duty as landowner, knowledge of bad actor's prior threats with knife, and Dram Shop liability); *Arnold v. Lemon,* 20 Pa. D. & C.3d 751 (Columbia Ct. Com. Pl. 1981) (allowing tavern patron to seek damages from tavern for injuries sustained in bar fight because fight was not "highly extraordinary"). But the matter at hand does not ask whether the defendants should be held liable for a drunken bar fight on their own property or for a drunk driving accident. To the contrary, the plaintiffs seek to hold the defendants liable for Orrostieta's brutal murder of their daughter away from the party a significant period of time after they left. None of the cited cases support such a holding.

Nor does the plaintiffs' argument that "all parties seemingly agree that drinking, and underage drinking in particular, is risky behavior and/or can lead to violence, injury or death," Acacia Opp. at 26-27, change the analysis.[18] Certainly, individuals, and especially minors, who drink to excess suffer an increased risk of harm. But this is not a case about a drunk driving accident, or a bar fight, or even a sexual assault at a fraternity house. This is a case about an abusive boyfriend who, after months of physical and psychological abuse, cruelly, brutally, and senselessly murdered his girlfriend, who had seemingly been a victim of his violent temper throughout their relationship.

Applying the factors the court described in *Trude,* first, Orrostieta's abuse "operat[ed] independently" from Acacia's and Chapter 84's purported conduct, because his abusive behavior began months before 276*276 the party. The plaintiffs argue (albeit in their response to Chapter 84's motion for summary judgment) that even though Orrostieta had been violent toward Karlie, that violence did not reach the level of murder until after the February 7-8 party. […] […] But as the plaintiffs acknowledge, Orrostieta's abuse was steadily increasing in its severity, and there is nothing, other than their conclusory allegation, to suggest that it was something about the alcohol at the Chapter 84 party which caused Orrostieta to "explode" in a way he had not done before. Of course, there has also been no evidence introduced that any member of Chapter 84 knew Orrostieta, let alone knew of his violent tendencies, which would have arguably made it foreseeable to them that he could become abusive if intoxicated.

Second, murder is not the "normal result" of underage drinking. Every weekend on college campuses across America, countless students face the risks of underage binge drinking, which includes the "normal," if often tragic, risks of alcohol poisoning, car accidents, slip and falls, and even sexual assault. But no reasonable finder of fact could include murder on that list. Indeed, as with the murderer in *Heeter,* Orrostieta's own decision to beat and strangle Karlie on February 8, 2015 was so extraordinary and so beyond the realm of any consequence a reasonable person would anticipate from underage drinking, that no reasonable factfinder could disagree that it was a superseding cause that breaks the chain of causation.

Of course, the plaintiffs here do not seek damages for harms that a party guest suffered on fraternity property or at the hands of fraternity members. Such distinct facts may very well call for a different result. *See Heeter,* 706 F. App'x at 67 ("Had the harm to Harris occurred near the Heeters' residence, which ADT was contracted to protect, the question of proximate cause might well have been one for a jury to decide. Harm inflicted this far from the residence is another matter."). But isolated to these particular facts—where the crime took place off fraternity property, entirely between non-fraternity members, after a party of which the national fraternity had no knowledge—the court cannot conclude that the law supports imposing liability here despite the tragic events which occurred. [19]

[…]

2. Whether a Genuine Dispute of Material Fact Exists Over Whether any Chapter 84 Member Knew Orrostieta Shoved Karlie and Whether that Changes the Foreseeability Analysis

In addition to their argument about the well-recognized dangers of alcohol, the plaintiffs argue that the murder was particularly foreseeable here because a reasonable factfinder could conclude that a Chapter 84 member witnessed Orrostieta shove Karlie. […]

Moreover, even if the Chapter 84 members had witnessed the shove, that would not have made Karlie's later murder in a different location foreseeable. The plaintiffs argue that *Rabutino v. Freedom State Realty Co., Inc.,* 809 A.2d 933 (Pa. Super. 2002), "is no different [from this case] when it comes to the dangerous atmosphere that existed and the violent act preceded by a confrontation that would have been seen by many." Chapter 84 Opp. at 20. To the contrary, *Rabutino* could not be more different than the facts here. In that case, a minor partygoer shot and killed the plaintiff's son in a race-based fight at a hotel. 809 A.2d at 935-36. The plaintiff attributed her son's death, in part, to the defendants', the hotel management and security companies, failure to intervene in the party. *Id.* at 936. The Superior Court held that the shooting death was foreseeable to the defendants, where

employees of the hotel "heard gunshots audible throughout the hotel being fired out of hotel windows prior the incident in question and . . . retrieved several of the bullet casings outside of the hotel." 809 A.2d at 940 n.5 (citing deposition testimony). Indeed, a deponent "described the fearful state of mind of fellow [hotel] employees and another lodger who refused to go on the fifth floor." *Id.* (citation omitted). Thus, the plaintiff's shooting death was undeniably foreseeable to the defendants, as they knew intoxicated minors not only were carrying, but actively shooting, guns.[29] And again, the intentional bad act in *Rabutino,* unlike here and in *Reilly,* occurred while the plaintiff was still on the defendant's property.

Here, in contrast, Smith testified that he sought to assist Karlie immediately after the altercation. He stated that he asked her whether she was alright and what was happening, and she confirmed that she was fine. *Id.* at 53:23-54:5. He estimated that he was at the party for a total of approximately two hours, and the shove occurred perhaps 30 to 60 minutes after they arrived. *Id.* at 92:2-17. Smith then tried to "keep tabs on" Karlie and Orrostieta for the remainder of the party to confirm there were no additional altercations. *Id.* at 54:14-18. As he was leaving, he sought to confirm that Karlie was alright one last time, and he saw she was dancing with Orrostieta and he "guess[ed] everything [was] good." *Id.* at 58:7-13. He explained, 284*284 "if they were still arguing, it would have been an issue. But they were dancing and everything seemed all right at that point." *Id.* at 58:17-20.

After the party, Smith met with a friend of Kristen's and told him what he had witnessed, and they decided to go to Kristen's room to tell her what had happened. *Id.* at 61:2-9. Smith testified that Kristen told him, "we thought something was going on between [Orrostieta and Karlie] for awhile," and the group agreed that the next morning, Smith and the friend would confront Orrostieta about his behavior. *Id.* at 61:13-22. Smith testified that Kristen had not told him that she believed Orrostieta had been "abus[ing]" Karlie, and if she had they would have done something "immediately." *Id.* at 62:5-12. Thus, none of these individuals—including the one who saw the altercation—believed that what happened at the party suggested that Karlie was in imminent danger. If the murder was not foreseeable to Smith, who witnessed the entire event and spoke to Karlie about it, or to Kristen, who had at least heard previous incidents between Orrostieta and her sister, it could not possibly have been foreseeable to a Chapter 84 member who would have had, at best, a small fraction of the information known to those two individuals. Certainly, a different set of facts where a Chapter 84 member had witnessed Orrostieta attack Karlie and then immediately try to leave with her, or a situation where Karlie asked for help (or was so incapacitated that she could not ask for help) could warrant a different result. But given the facts here, even if a Chapter 84 member knew Orrostieta shoved Karlie, Orrostieta's later behavior in beating and strangling her to death was such an extraordinary departure that no one—not Smith, Kristen, or any member of Chapter 84—could have predicted it.

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