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Proximate Cause: Must an Intervening Force be Foreseeable?

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PROXIMATE CAUSE: MUST AN INTERVENING FORCE BE FORESEEABLE?

Mozer v. Semenza, 177 So. 2d 880 (3d D.C.A. Fla. 1965)

Defendant owned and operated a hotel in which there was an unenclosed stairwell. He had been warned by a city fire inspector that this stairwell constituted a hazardous condition because the draft it created would cause a fire to spread rapidly. Defendant failed to correct the faulty condition. Subsequently, the hotel was set on fire by an arsonist. The plaintiffs, guests in the hotel, were burned and seriously injured while running from the fire. They brought suit against the hotelkeeper for injuries sustained. Judgment was for plaintiffs in the trial court. On appeal, HELD, the defendant's negligence was a proximate cause of the injury despite the intervening act of the arsonist. As long as the general risk of fire was foreseeable, it was irrelevant whether the intervening force was foreseeable or not. Judgment affirmed.

It has long been a principle of tort law that in order to establish liability in negligence cases it must be proved that defendant's breach of duty was the "proximate cause" of plaintiff's injury as well as the "cause in fact."[1] This broad principle has been generally accepted by the Florida courts.[2] However, since proximate cause is essentially a matter of court policy involving more than a factual determination of causation, there is a great amount of diversity in the reports.[3]

The question of proximate cause is frequently raised when, as in *Semenza*, a third force intervenes between the defendant's negligence and the resulting injury. "Intervening force" is defined by the *Restatement of Torts* as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed."[4] Intervening force is relevant because such a force may relieve the originally negligent actor of liability. The extent of relief from liability is frequently resolved in terms of foreseeability, the general rule being that unless the intervening force is reasonably fore-

1. PROSSER, TORTS 282 (3d ed. 1964); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906); McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 155-56 (1925).

2. *E.g.*, Cone v. Inter County Tel. & Tel. Co., 40 So. 2d 148 (Fla. 1949); Tampa Elec. Co. v. Jones, 138 Fla. 746, 190 So. 26 (1939); Seaboard Air Line Ry. v. Mullin, 70 Fla. 450, 70 So. 467 (1915).

3. This diversity is candidly recognized, and perhaps exaggerated in *Semenza* at 883: "It is notorious that proximate cause is in most cases what the courts will it to be and that it is at best a theory under which the courts justify liability or shield from liability those that the courts find should not in reason and logic be responsible for a given result."

4. RESTATEMENT (SECOND), TORTS §441 (1965).

seeable the original actor is not liable.[5] When the Florida courts find an intervening force unforeseeable and relieve the originally negligent defendant from liability they refer to the intervening force as an "independent efficient cause."[6]

The *Semenza* case involves a type of factual situation in which it is hard to absolve the first actor even though the intervening force was unforeseeable; in this situation the intervening force was unforeseeable, but the particular harm was foreseeable. For purposes of brevity, this will be referred to as the "unforeseeable force — foreseeable harm" situation. In *Semenza,* for example, the arsonist was an unforeseeable intervening force but the particular harm that occurred, a quickly spreading fire, was that threatened by defendant's negligence, and thus foreseeable.

The courts have handled the "unforeseeable force — foreseeable harm" situation in a variety of ways that do not always fit into the neat patterns set out in the treatises and hornbooks.

Many courts have strictly followed the foreseeability test and have found no liability when the intervening force was not foreseeable, even though the harm that resulted was that threatened by defendant's negligence.[7] Courts are even more likely to take this position when the intervening force is criminal.[8] Florida has, in the past, generally followed this line of cases whether the intervening act was criminal or not.[9]

Other courts have felt that defendant should not be excused from liability in the "unforeseeable force — foreseeable harm" situation. However, these courts have used different approaches in justifying a finding of liability. Some of these approaches unnecessarily add to the confusion of proximate cause.

Some courts finding liability adhere, *in their language,* to the traditional rule that the intervening force must be foreseeable. However, when an "unforeseeable force — foreseeable harm" situation pre-

5. See the great number of cases from many jurisdictions collected by PROSSER, TORTS 310-26 (3d ed. 1964).

6. *E.g.,* Rawls v. Ziegler, 107 So. 2d 601 (Fla. 1958); Atlantic Coast Line Ry. v. Ponds, 156 So. 2d 781 (2d D.C.A. Fla. 1963); Lingefelt v. Hanner, 125 So. 2d 325 (3d D.C.A. Fla. 1960); Pope v. Pinkerton-Hays Lumber Co., 120 So. 2d 227 (1st D.C.A. Fla. 1960), *cert. denied,* 127 So. 2d 443 (Fla. 1961).

7. *E.g.,* Millirons v. Blue, 48 Ga. App. 483, 173 S.E. 443 (1934); Indiana Serv. Corp. v. Johnston, 109 Ind. App. 204, 34 N.E.2d 157 (1941); Chancey v. Norfolk & W. Ry., 174 N.C. 351, 93 S.E. 834 (1917).

8. See Seith v. Commonwealth Elec. Co., 241 Ill. 252, 89 N.E. 425 (1909); Klaman v. Hitchcock, 181 Minn. 109, 231 N.W. 716 (1930); Miller v. Bahmmuller, 124 App. Div. 558, 108 N.Y. Supp. 924 (1908).

9. See Mahr v. General Tel. Co., 163 So. 2d 285 (Fla. 1964); Rawls v. Ziegler, 107 So. 2d 601 (1958); Tampa Elec. Co. v. Jones, 138 Fla. 749, 190 So. 26 (1939); Atlantic Coast Line Ry. v. Ponds, 156 So. 2d 781 (2d D.C.A. Fla. 1963).

sents itself, and the court wants to uphold the jury's finding of liability, it merely stretches foreseeability and holds the intervening force foreseeable.[10] In one extreme case,[11] with facts somewhat similar to those in *Semenza*, the intervening act of an arsonist was declared foreseeable in order to hold the originally negligent defendant liable. These cases appear undesirable because they apply one test of foreseeability to the intervening force when the harm is not foreseeable and a different test when the harm is foreseeable.

Other courts find liability by labeling the original negligence a cause "concurrent" with the intervening force, even though the second force came after, and was not set in motion by, the original negligence.[12] Florida courts have followed this reasoning in several cases.[13] These cases cause confusion by applying the label "concurrent force" to what is generally considered to be an intervening force.[14]

A final way in which some courts have found liability in the "unforeseeable force – foreseeable harm" cases is more straightforward; these courts have simply declared that there will be liability if the *harm* is foreseeable whether or not the intervening *force* was foreseeable.[15] This approach was taken in a leading federal case[16] in which the defendant negligently failed to clean explosive gas from an open barge. The gas was later ignited by lightning, an unforeseeable intervening force. Defendant was held liable because the harm, an explosion, was a foreseeable result of his negligence. This was the direct approach used by the Third District Court of Appeal in the *Semenza* case. The court clearly stated that as long as the risk of harm was foreseeable due to defendant's negligence "it is not important to the liability of the [defendant] whether the fire started in one way or another."[17] *Mahr v. General Telephone Co.*,[18] decided before *Semenza*, indicated that the majority of the Florida Supreme

10. See Ferrogiaro v. Bowline, 153 Cal. App. 2d 759, 315 P.2d 446 (1957); Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962); Schafer & Olson v. Varney, 191 Wis. 186, 210 N.W. 359 (1926).

11. Torrack v. Corpamerica, 51 Del. 254, 144 A.2d 703 (1958).

12. See Russell v. City of Idaho Falls, 78 Idaho 466, 305 P.2d 740 (1956); Wilson v. Scurlock Oil Co., 126 So. 2d 429 (La. Ct. App. 1960); Brown v. Nat'l Oil Co., 233 S.C. 345, 105 S.E.2d 81 (1958).

13. See Starling v. City of Gainesville, 90 Fla. 613, 106 So. 425 (1925); Town of De Funiak Springs v. Perdue, 69 Fla. 326, 68 So. 234 (1915).

14. See RESTATEMENT (SECOND), TORTS §441 (1965).

15. See Gibson v. Garcia, 96 Cal. App. 2d 681, 216 P.2d 119 (1950); United Novelty Co. v. Daniels, 42 So. 2d 395 (Miss. 1949); Riley v. Standard Oil Co., 214 Wis. 15, 252 N.W. 183 (1934).

16. Johnson v. Kosmos Portland Cement Co., 64 F.2d 193 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933).

17. Mozer v. Semenza, 177 So. 2d 880, 883 (3d D.C.A. Fla. 1965).

18. 163 So. 2d 285 (Fla. 1964).

Court was not ready to accept the "foreseeable harm" doctrine. However, three justices dissented and indicated support for the "foreseeable harm" doctrine, while citing with approval the leading federal case mentioned above. *Mahr* was not considered in the *Semenza* opinion.

The rationale of the foreseeable harm theory is that the defendant's negligence that threatens a particular harm should not be excused just because the harm is brought about through an unforeseeable intervening force. The hotelkeeper in *Semenza* was negligent in not remedying a dangerous condition that he was warned to fix. Granted that the fire was started by an unforeseeable intervening force, still it was probably the hotelkeeper's negligence that caused the building to burn rapidly enough to injure the guests. Since the harm was foreseeable, why should defendant be absolved simply because the manner in which the fire started was unforeseeable? If defendant had not been negligent the plaintiffs might well have had time to escape unharmed. This is not to say that defendant should be liable when both the intervening force and the harm are unforeseeable. The Third District Court, which decided *Semenza*, holds no liability when both are unforeseeable.[19]

Another consideration in *Semenza* was the fact that the intervening force was a criminal one. It might be argued that the originally negligent defendant, being less culpable than the criminal, should be absolved of liability. Many courts do shift the responsibility to the criminal,[20] but what if the criminal is not apprehended or, more likely, is insolvent? Then, if the original defendant is not held liable, the burden is being left upon the innocent plaintiff. It is not being shifted to the criminal. As between innocent plaintiff and negligent defendant, certainly defendant is more culpable. It would appear, then, that the better rule would be to hold defendant liable even if the intervening force is a criminal one. If the criminal is found and is solvent, negligent defendant should be able to get reimbursement from him, since Florida courts recognize the principle of indemnity.[21] If the criminal is not found or is not solvent, the negligent defendant should not complain about having to bear the loss because, after all, he is more at fault than the injured plaintiff.

19. Lingefelt v. Hanner, 125 So. 325 (3d D.C.A. Fla. 1960).

20. See cases cited note 8 *supra*.

21. See Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932). No cases have been found that either apply or reject indemnity in a Florida case similar to *Semenza*. However, it is only when the courts find liability that they can apply the indemnity principle.

Semenza, by adopting the "foreseeable harm" test, follows the general trend toward increased tort liability. In applying this test even when the unforeseeable intervening force was a criminal one, the Third District Court of Appeal appears to have gone further than other Florida courts and the courts of many other jurisdictions. However, *Semenza* should be considered sound law by those who think it basically unfair to let defendant escape liability for the predictable results of his negligence.

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