Maryland Law Review

Volume 21 | Issue 1 Article 7

Foreseeable Intervening Negligence Not a Superseding Cause - Jubb v. Ford

M. Albert Figinski

FORESEEABLE INTERVENING NEGLIGENCE NOT A SUPERSEDING CAUSE

Jubb v. Ford.[1]

Appellant's carry-all, with the words "School Bus" painted on its rear, was used to transport seven mentally-retarded children to and from school. However, this "school bus" was not equipped with flashing stop signals required of school buses by statute,[2] and its capacity was too small to afford it the school bus privilege of stopping on the travelled portion of the highway.[3] One rainy day the carry-all stopped in the slow lane of Ritchie Highway to discharge the plaintiff into the care of her awaiting father. A Cadillac approached the "bus" from the rear and began to pass. When the driver noted the words "School Bus," he applied his brakes, hoping to stop the statutory

[1] 221 Md. 507, 157 A. 2d 422 (1960).

[2] 6 MD. CODE (1957) Art. 66½, § 257.

[3] *Id.*, § 255. The school bus stands in a preferred position on the American highway. The duty to stop behind a school bus is as "inflexible . . . as that of obeying the boulevard law and . . . a school bus driver has the right to assume that [the duty] will be obeyed implicitly by cars approaching from the front and rear." Chackness v. Board of Education, 209 Md. 88, 95-96, 120 A. 2d 392 (1956). Motorists have the concomitant duty of watchfulness and attentiveness. Richards v. Miller North Broad Transit Co., 96 N.H. 272, 74 A. 2d 552 (1950); Hughes v. Thayer, 229 N.C. 773, 51 S.E. 2d 488 (1949); Wheaton v. Conkle, 57 Ohio App. 373, 14 N.E. 2d 363 (1937). The motorist's duty is not diminished even if the school bus stops negligently on the road in violation of statute, and the motorist's negligence may be the proximate cause of the injury to a child alighting from such school bus. Allyn & Bacon Book Publishers v. Nicholson, 58 Ga. App. 729, 199 S.E. 771 (1938). Where the school bus has electric signal devices in working order as required by statute, the operator need not give hand signals as required of other users of the highway. Webb v. Smith, 176 Va. 235, 10 S.E. 2d 503, 131 A.L.R. 558 (1940). For a comprehensive discussion, see 30 A.L.R. 2d 105 (1953).

distance behind the "bus."[4] As a normal stop was being made, the Cadillac was struck from the rear by a tractor-trailer which jack-knifed when its brakes were applied. The impact threw the Cadillac against the carry-all, which, as a result, struck the plaintiff, who sued the owners of the carry-all, the Cadillac, and the tractor-trailer. The jury returned a verdict against the carry-all and the tractor-trailer, and the former appealed.

Although the Maryland Court of Appeals remanded the case for a new trial because of an improper instruction, the Court nevertheless commented on the facts of the case. The Court saw the carry-all as negligent in stopping where it should not stop, because it was not a school bus within the statutory definition. This negligence was compounded by the imitation of a school bus, in color and lettering, but not in signalling devices. This partial imitation foreseeably could and did confuse motorists as to the nature of the carry-all.[5] This view of the case caused the Court to reject the carry-all's contention that the negligence of the tractor-trailer was a superseding cause to relieve the carry-all of liability.[6]

Legal writers[7] and the courts agree that intervening negligence which is not extraordinary[8] or unusual,[9] but

[4] Drivers approaching or overtaking a school bus stopped on the highway for the purpose of receiving or discharging children are required to "come to a full stop at least ten (10) feet from such school bus." 6 MD. CODE (1957) Art. 66½, § 259. By the Cadillac driver's own admission, he would have been unable to come to a complete stop more than four feet to the rear of the carry-all. *Supra*, n. 1, 510.

[5] A carry-all is not the usual type of school bus a motorist expects to encounter on the highway. Therefore, a motorist would not at first glance readily recognize that the carry-all was a school bus. The Cadillac driver did not realize the true nature of the carry-all until he had begun his passing movement. *Supra*, n. 1, 510. The driver of the tractor-trailer could not be found to testify at the trial. By agreement, his traffic court statement was admitted into evidence. He stated that he thought the carry-all was a State Roads vehicle and prepared to follow the Cadillac in passing it. The driver of the trailer claimed he did not notice, due to the lack of flashing stop signals, that the carry-all was a school bus until the tractor-trailer was "already sliding." *Supra*, n. 1, 511.

[6] "Our view is that if a jury determined [the owner of the carry-all] to have been negligent, his acts and omissions induced the negligent acts and omissions of the [driver of the tractor-trailer] and the two would have concurred in causing the injury." *Supra*, n. 1, 513.

[7] 2 RESTATEMENT, TORTS (1934) §§ 433, 439, 447; PROSSER, TORTS (2d ed. 1955) § 49. "The view that one need not foresee the misconduct of another, . . . has long since given place to the modern conception that anything which is, in fact, likely to occur, is legally foreseeable." Bohlen, *The Moral Duty To Aid Others As Basis For Tort Liability*, 56 U. Pa. L. Rev. 316, 330-331, n. 79 (1908).

[8] Roadman v. Bellone, 379 Pa. 483, 108 A. 2d 754, 759 (1954); 2 RESTATEMENT, TORTS (1934) §§ 433, 447.

[9] Stone v. Boston & A. R. Co., 171 Mass. 536, 51 N.E. 1, 3 (1898); Kelson v. Public Service R. Co., 94 N.J.L. 527, 110 A. 919 (1920).

is instead a foreseeable[10] consequence which could reasonably have been anticipated[11] as likely to follow one's negligence, will not serve as a superseding cause to relieve the initially negligent actor of liability. When the foreseeable negligent act combines with the prior negligence, the acts become concurrent causes of the injury[12] and the actors are held jointly and severally liable to the injured party.[13]

There is difficulty in the application of this well-settled rule[14] because the concept of foreseeability is inextricably bound to the factual situation presented. Negligence and causation, unlike the answers to algebraic problems, cannot be determined simply by reliance on a scientific, or ritualistic, process or formula.[15] The broadly-phrased rules are only a starting point. The courts must look to the jury[16] for the solutions, reached by common sense[17] applied to the facts of the case.

At first glance the principal case may seem to stretch the doctrine of foreseeability to its breaking point. However, the case is not out of line with previous judicial pronouncements in similar intervening negligence cases.[18]

---

[10] McVey v. Gerrald, 172 Md. 595, 602, 192 A. 789 (1937); Marquardt v. Orlowski, 18 Ill. App. 2d 135, 151 N.E. 2d 109, 114 (1958); Rowell v. City of Witchita, 162 Kan. 294, 176 P. 2d 590, 596-597 (1947); Cwik v. Zylstra, 58 N.J. Super. 29, 155 A. 2d 277, 280-281 (1959); Genovay v. Fox, 50 N.J. Super. 538, 143 A. 2d 229, 235, 236 (1958).

[11] Holler v. Lowery, 175 Md. 149, 162, 200 A. 353 (1938); Penn. Steel Co. v. Wilkinson, 107 Md. 574, 581, 69 A. 412 (1908); Washington v. Kemp, 97 Ga. App. 235, 102 S.E. 2d 910, 913 (1958); Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E. 2d 705 (1949).

[12] Penn. Steel Co. v. Wilkinson, *supra*, n. 11.

[13] Steele v. Rapp, 183 Kan. 371, 327 P. 2d 1053, 1062 (1958).

[14] Garbis v. Apatoff, 192 Md. 12, 16-17, 63 A. 2d 307 (1949).

[15] PROSSER, *op. cit. supra*, n. 7, 257:

> "'Proximate cause' cannot be reduced to absolute rules. No better statement ever has been made concerning the problem than that of Street [Foundations of Legal Liability, 1906, 110]: 'It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. . . .'"

[16] Campbell v. State, 203 Md. 338, 346, 100 A. 2d 798 (1953).

[17] Urging a dissecting glance at the facts is the Maryland Court of Appeals statement that it would "not indulge in subtleties and refinements as to causation that might defeat the ends of justice." Mullan v. Hacker, 187 Md. 261, 269, 49 A. 2d 640 (1946).

[18] Lombardi v. Wallad, 98 Conn. 510, 120 A. 291, 294 (1923), used strikingly similar language to two Maryland cases, *infra*, ns. 19, 20, to find liable one who had reduced to burning embers a fire he had been using in a place frequented by children, and who then left the spot unguarded to get water to extinguish the embers only to have his absence result in an eight year old boy igniting a stick in the embers, and touching it to the plaintiff child's dress, thus causing the compensated injuries.

A driver who lost control of his car when his arm was seized by a playful inebriated passenger could not claim the seizure was a superseding cause to relieve himself of liability for the damage caused by the uncontrolled car. Bessette v. Humiston, 121 Vt. 325, 157 A. 2d 468 (1960).

The principal case and related cases in which the contention is formulated that the intervening negligence serves as a superseding cause involve situations where the negligence of the first actor will only result in injury to the plaintiff if a second actor is also negligent. Two Maryland cases[19] spoke with direct reference to such a situation. They concluded that

> ". . . the liability of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not. If [the original negligent actor] could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another."[20]

In essence, this pronouncement seems to state that the foreseeable intervening negligent act is within the scope of the risk created by the original negligent actor. Being within the scope of the risk, it follows that it should be within the scope of the liability created by that risk.

In gauging the foreseeability of a subsequent act, matters of common knowledge[21] are imputed to the actors. Futhermore, the occasional negligence which is one of the ordinary incidents of human life often must be antici-

---

That one boy would push another in the direction of a pail of scalding water and that the one pushed would lose his balance and fall into the pail was a foreseeable danger that a grandmother should have anticipated. Cwik v. Zylstra, 58 N.J. Super. 29, 155 A. 2d 277, 281 (1959).

It was foreseeable and reasonably to be anticipated that the sale of beverages in a bottle in an athletic stadium would result in a spectator being hit by a thrown bottle. Rowell v. City of Wichita, 162 Kan. 371, 176 P. 2d 590 (1947).

That a rope left dangling from defendant's bridge construction job would be jerked and possibly cause fright to horses and resultant injury to their drivers or pedestrians in the street below the construction job was to be anticipated, even if the rope was jerked by one other than an employee of the construction firm. Penn. Steel Co. v. Wilkinson, 107 Md. 574, 581, 582, 69 A. 412 (1908).

[19] Holler v. Lowery, 175 Md. 149, 200 A. 353 (1938); State v. Hecht Company, 165 Md. 415, 169 A. 311 (1933). See Bessette v. Humiston, 121 Vt. 325, 157 A. 2d 468, 470 (1960), which stated:

> "Negligence may lie in the creation of a dangerous situation, although the final injury is activated by the conduct of a third person . . . . Where there is likelihood of harm from an intentional or reckless act of an outsider, the actor who creates the situation of danger may be held responsible for the act of the immediate wrongdoer."

[20] State v. Hecht, *supra*, n. 19, 422, quoted verbatim (except for punctuation) in Holler v. Lowery, *supra*, n. 19, 162.

[21] Lashley v. Dawson, 162 Md. 549, 560, 160 A. 738 (1932).

pated.[22] Going a step further, the user of the highway who violates the law may not assume that others will use an abnormal amount of care to discover his wrongful act,[23] nor may he expect that all other users will refrain from violating the traffic regulations. Rather, ". . . it [is] incumbent upon [one who violates the traffic laws] to anticipate that others, like [himself], might disobey the traffic laws and regulations."[24]

Running through many[25] of the intervening negligence cases and serving as a determinative rule to gauge the superseding character of the intervening act, is the "but for" concept. According to this rule, the original actor's conduct is not a cause of the event, if the event would have occurred without it.[26] Although this rule is recognized as explaining the great number of cases,[27] its validity is questioned by Prosser[28] and rejected by the Restatement in favor of the "substantial factor" test.[29] The Restatement[30] declares that, where the initial actor's conduct was a substantial factor in bringing about the harm, a negligent intervening act is not a superseding cause that will discharge the initial actor of liability, if (1) there was a "realizable likelihood"[31] of the occurrence of the intervening act at the time when the initial actor committed his negligent act, and (2) if the intervening act was not of an extraordinary nature.

A third formula, applying to intervening negligence cases, would hold liable the original negligent actor if the intervening act was a natural and probable consequence of the original negligence. Restated, if the intervening act was foreseeable or within the scope of the risk, the original negligent actor will not be relieved of liability.[32]

The ingredients, it will be noted, are similar in the "substantial factor" test and the "natural and probable consequences" formula. Whether the determining factor

[22] 2 RESTATEMENT, TORTS (1934) § 302, Comment 1; PROSSER, TORTS (2d ed. 1955) § 32 c.

[23] Washington v. Kemp, 97 Ga. App. 235, 102 S.E. 2d 910, 913 (1958).

[24] *Id.*

[25] Washington v. Kemp, 97 Ga. App. 235, 102 S.E. 2d 910, 913 (1958); Steele v. Rapp, 183 Kan. 371, 327 P. 2d 1053, 1062 (1958); Marchl v. Dowling, 157 Pa. Super. 91, 41 A. 2d 427, 428 (1945); Dooley v. Borough of Charleroi, 328 Pa. 57, 195 A. 6, 8 (1937); Hughes v. Pittsburgh Transp. Co., 300 Pa. 55, 150 A. 153, 155 (1930).

[26] PROSSER, TORTS (2d ed. 1955) § 44, 220.

[27] *Id.*, 220-221.

[28] *Op. cit. supra*, n. 26.

[29] 2 RESTATEMENT, TORTS (1934), §§ 433, 447.

[30] *Id.*, § 447.

[31] *Op. cit. supra*, n. 29, § 447, Comment on Clause (a) : a.

[32] PROSSER, *op. cit. supra*, n. 26, 255.

of the respective tests is "realizable likelihood" of the occurrence of the intervening act or the foreseeability of said act, the judicial emphasis will be focused on analogous segments of the factual situations to which the tests are applied.

An ambitious attempt to avoid the "but for" test and to provide the jury with more definite guidelines than "substantial factor" or the foreseeability of certain actions was made by the Supreme Court of Pennsylvania in *Kline v. Moyer*.[33] The Court held that the original negligent actor is only relieved of liability if the second actor is *aware* of the dangerous situation created by the negligence of the first actor at a time when the accident is avoidable, and the second actor is thereafter negligent.[34]

In a footnote appended to the statement of the rule the Court noted the Restatement distinction "between a 'normal response' and an 'extraordinarily negligent' act on the part of the second tort-feasor."[35] The Court concluded that a negligent act, after one had recognized a dangerous avoidable situation, would be an extraordinary, and not a normal, response, which could not be reasonably foreseen by the first actor.[36]

While the Court felt compelled to show how its rule meshed with that of the Restatement, it is necessary to note the difference in emphasis between *Kline v. Moyer* on the one hand, and the concept of a foreseeable intervening act, on the other. Whereas *Kline v. Moyer* stresses the awareness of the second actor, the inevitability of the result at the moment of awareness, and the second actor's reaction to his awareness of the original actor's

---

[33] 325 Pa. 357, 191 A. 43, 111 A.L.R. 406 (1937). The original negligence in this case involved a disabled, unlighted truck left on a two-lane highway. This position forced a car negligently proceeding at dusk in the lane in which the truck rested to move across the dividing line into the path of the plaintiff, causing the injuries for which the plaintiff sought and won recovery from both the driver of the car and the owner of the truck.

[34] *Id.*, 46.

"Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tortfeasor, and thereafter, by an independent act of negligence, brings about accident, the first tortfeasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tortfeasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both the guilty parties."

[35] *Id.*

[36] *Supra*, n. 33.

negligence, the concept of a foreseeable intervening act stresses the first actor's duty to anticipate the intervening misconduct and guard against it.

The virtue of the *Kline v. Moyer* principle is that it may place before the jury a more tangible, less subjective yardstick than foreseeability or "substantial factor." Of course, its applicability is necessarily limited to cases in which "awareness" can be judged, either by reference to the individual's reaction to the stimulus of the first actor's negligence,[37] or by considering the standard of awareness accorded the reasonable man. As a rule supplemental to the concept of foreseeability and applied in cases where awareness can be judged, the *Kline v. Moyer* principle seems to have genuine value.

Kline v. Moyer has never been cited in Maryland although it has won judicial endorsement beyond its own jurisdiction[38] while remaining a bulwark there.[39] Maryland adopts the foreseeability standard.[40] In the principal case, in order to declare the events foreseeable,[41] the Court was forced to distinguish *Maggitti v. Cloverland Farms Dairy*[42] and *Bloom v. Good Humor Ice Cream Co.*,[43] both of which rejected claims that double parked vehicles had contributed to the accidents therein.

The Court, however, declared that the principal case presented more than a passive negligence situation, and that the connection between the acts and omissions of the

[37] In the principal case the driver of the tractor-trailer, according to his testimony, did not become aware of the perilous situation, i.e. that the carry-all was a school bus and that the Cadillac was stopping in deference to the laws protecting such vehicles, until his trailer had begun to slide, and when he could not prevent the accident. 221 Md. 507, 511, 157 A. 2d 422 (1960). Had the Kline v. Moyer principle been applied to these facts, both the carry-all and the tractor-trailer would have been held liable.

[38] Medved v. Doolittle, 220 Minn. 352, 19 N.W. 2d 788, 793-4 (1945); Lee v. Carolina Upholstery Co., 227 N.C. 88, 40 S.E. 2d 688, 689-690 (1946); Louisville & Nashville Railroad Company v. Head, ... Tenn. . . . . , 332 S.W. 2d 682, 691 (1959); Carney v. Goodman, 38 Tenn. App. 55, 270 S.W. 2d 572, 576 (1954); McMurdie v. Underwood, 9 Utah 2d 400, 346 P. 2d 711, 717 (1959); Atlantic Coast Line R. Co. v. Withers, 192 Va. 493, 65 S.E. 2d 654, 659 (1951); Johnson v. Cone, 112 Vt. 459, 28 A. 2d 384, 388 (1942).

[39] Humphrey v. Lovejoy, 250 F. 2d 879, 880 (3rd Cir. 1957); Steele v. Peoples Natural Gas Company, 386 Pa. 439, 127 A. 2d 96, 100 (1956); Listino v. Union Paving Company, 386 Pa. 32, 124 A. 2d 83, 85-86 (1956); Jeloszewski v. Sloan, 375 Pa. 360, 100 A. 2d 480, 482 (1953); Martz v. Deitrick, 371 Pa. 639, 92 A. 2d 678, 680-1 (1952); Tolomeo v. Harmony Short Line Motor Transp. Co., 349 Pa. 420, 37 A. 2d 511, 514 (1944); Ashworth v. Hannum, 347 Pa. 393, 32 A. 2d 407, 409 (1943).

[40] *Supra, circa* ns. 19, 20.

[41] 221 Md. 507, 513, 157 A. 2d 422 (1960).

[42] 201 Md. 528, 95 A. 2d 81 (1953).

[43] 179 Md. 384, 18 A.2d 592 (1941).

"School Bus" and the injury was ". . . far more likely to have occurred as a result of what [the bus owner] did or did not do, and so to have been anticipated, than in those cases."[44]

This statement is very persuasive in regard to the *Maggitti* case, where a six year old child was denied recovery against the dairy after he was struck down by a speeding truck when he attempted to cross the street in front of a double parked milk truck. That case apparently turned on the fact that there was no allegation that the dairyman attracted the child or knew of his presence.[45]

But the "confusing situation" created by the "partial imitation" of a school bus does not seem "far more likely" a result than one would expect from the *Bloom* case. There, a child, who had crossed a street to make a purchase from a double parked vendor, was struck as he returned across the street by an automobile negligently passing the vendor. The child was denied recovery because the negligence of the ice cream vendor was not the natural logical cause of the injury. The Court said:

> "It [the injury] must be the natural and probable consequence of the negligent act, unbroken by any intervening agency, and where the negligence of any one person is merely passive, and potential, while the negligence of another is the moving and effective cause of the injury, the latter is the proximate cause and fixes the liability."[46]

The Court buttressed its theory by pointing out that the accident did not occur when the child approached the

---

[44] 221 Md. 507, 514, 157 A. 2d 422 (1960).

[45] "[H]e had . . . no reason to anticipate that a child of whose presence he was unaware would attempt to cross the street between intersections, and that a passing motorist operating his car at a high rate of speed and negligently failing to have his car under control . . . would run the child down." 201 Md. 528, 535, 95 A. 2d 81 (1953). *Cf.* Marchl v. Dowling, 157 Pa. Super. 91, 41 A. 2d 427 (1945), where a seven year old child was struck by an automobile as it was passing a double parked truck. Both the motorist and the truck company were held liable. The Pennsylvania court said:

> ". . . the illegal parking of [the] truck was a causal and substantial factor in minor plaintiff's injury, and . . . the intervening act of [the motorist] was not a superseding cause * * *. There would have been no injury to the minor plaintiff but for the negligence of [the truck driver], which first put the minor plaintiff in peril and which existed when the negligence of [the motorist] turned the peril into actual injury." (428)

The violation of a statute in Pennsylvania is negligence *per se*. Jinks v. Currie, 324 Pa. 532, 188 A. 356, 358 (1936). However, it is only some evidence of negligence in Maryland. Liberto v. Holfeldt, 221 Md. 62, 65, 155 A. 2d 698 (1959).

[46] 179 Md. 384, 387, 18 A. 2d 592 (1941).

vendor or while he was near the truck,[47] and that the salesman did nothing to cause the child to leave the truck or cross the street.[48]

This may be fine theoretical reasoning but it seems rather foreseeable that a child who makes a purchase from such a vendor will return across the street to the sidewalk from which he came and be subjected to the perils of the street, one of which is negligent drivers.

Judicial disuse has limited the stature of the *Bloom* doctrine.[49] The principal case, by its view of its own factual situation, rigidly restricts it to the factual situation presented therein, in spite of the Court's attempt to distinguish it from the situation presented in the principal case.

To dispute the conclusions drawn from the varying factual situations merely emphasizes points made above. Mathematical predictability is not a feature of the law of negligence. The enunciation of a general rule does not foreclose discussion. That rule is only given meaning and facilitates the end of justice by the intelligent application of the principle to the facts of the case.[50] In regard to the field of law herein discussed the general rule would be that a foreseeable intervening negligent act will not exculpate an original negligent actor who sets the stage for the intervening negligence. And, when a particular decision is rendered as to the facts of a case, a critical observer may find comfort in a statement of Mr. Justice Holmes:

> ". . . when you realize that you are dealing with a matter of degree, you must realize that reasonable men may differ widely as to the place where the line should fall."[51]

M. Albert Figinski

---

[47] *Id.*, 388.

[48] *Supra*, n. 46, 389.

[49] Since pronouncement the *Bloom* doctrine has only been cited by the Court on three occasions.

[50] Pound, *Mechanical Jurisprudence*, 8 Col. L. Rev. 605, 620-621, 622 (1908):

> "The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words. * * *
>
> "[The true] task of a judge is to make a principle living, not by deducing from it rules, to be, like the Freshman's hero, 'immortal for a great many years,' but by achieving thoroughly the less ambitious but more useful labor of giving a fresh illustration of the intelligent application of the principle to a concrete cause, producing a workable and a just result."

[51] Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926) (dissenting opinion).