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TORTS—PROXIMATE CAUSE—SUPERSEDING CAUSE

Three defendants, the Standard Oil Company, Parker, their lessee, and Powell, a contractor, negligently removed an underground storage tank and allowed a large quantity of gasoline to spill and flow on a city street. The fire department was summoned. After the street had been washed, a fireman at the direction of the fire chief touched a lighter to the street to test the effectiveness of the washing. The resulting fire damaged plain-

tiff's automobile. The trial court held Standard, Parker, Powell, the fireman and the fire chief liable.¹ Upon appeal by defendants Standard, Parker and Powell² to the Supreme Court of Kansas, *held*: Affirmed. The act of the fireman in touching his lighter to the pavement was not so unrelated to the negligent spilling of the gasoline as to constitute the sole proximate cause of the fire. The negligent spilling of the gasoline and the touching of the lighter to the pavement were both proximate causes of the fire and the damage.³

It has frequently been recognized that there may be more than one proximate cause of an injury.⁴ In most jurisdictions the first wrongdoer, even though his act has merely set the stage on which the second wrongdoer contributes to the plaintiff's injury, is no longer relieved from liability. The courts argue that the second negligent act is merely a means by which the first wrongful act becomes harmful.⁵ One of the tests in delimiting liability in such a case is whether the later negligent act was itself foreseeable.⁶ Thus, it is generally held that a defendant will not be relieved of liability by an intervening force⁷ which could reasonably have been foreseen, or by an intervening force which is a normal incident of the risk involved.⁸

However, it is a well established principle that the rules with respect to proximate cause and substantial factors producing

¹ Demurrers by Standard, Parker and Powell that the petition did not disclose facts sufficient to constitute a cause of action were overruled.

² Appealed on the grounds that the trial court erred in overruling the demurrers in that it must have been concluded as a matter of law that any negligence with which they were charged was not the proximate cause of the damage sustained and that the proximate cause was the intervening acts of the firemen.

³ *Trapp v. Standard Oil Company*, 176 Kan. 39, 269 P.2d 469 (1954).

⁴ *Waterloo Savings Bank v. Waterloo, Cedar Falls & Northern R.R.*, 60 N.W.2d 572 (Ia. 1953); *Continental Southern Lines, Inc. v. Klass*, 217 Miss. 795, 65 So.2d 575 (1953); *Magnolia Petroleum Co. v. Sutton*, 208 Okl. 488, 257 P.2d 307 (1953).

⁵ *Hillyard v. Utah By-Products Co.*, 263 P.2d 287 (Utah 1953); *Bohlen, Fifty Years of Torts*, 50 Harv. L. Rev. 1225, 1229 (1937).

⁶ See note 5 *supra*.

⁷ "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Restatement, Torts § 441 (1934).

⁸ *Long v. Crystal Refrigerator Co.* 134 Neb. 44, 277 N.W. 830 (1938); *Nelson v. William H. Ziegler Co.*, 190 Minn. 313, 251 N.W. 534 (1933); *Magay v. Clafin-Sumner Coal Co.*, 257 Mass. 244, 153 N.E. 534 (1926); *McClure v. Hoopston Gas and Electric Co.*, 303 Ill. 89, 135 N.E. 43 (1922).

the harm are limited by those with respect to superseding⁹ intervening causes.¹⁰ In applying the test of foreseeability to such intervening causes, the court in the much quoted case of *Kline v. Moyer*¹¹ drew a clear cut distinction between two classes of cases. The first situation is where one has negligently created a dangerous condition and a later actor becomes aware of the dangerous condition but negligently fails to avoid it. The second situation involves conduct of a later intervening actor who negligently fails to observe the dangerous condition until it is too late to avoid it. The original actor is relieved of liability in the first situation but held liable in the second. The reasoning in the first situation is that it is not reasonably to be foreseen that one who actually becomes cognizant of a dangerous condition in ample time to avert injury will fail to do so. This rule has been followed in many jurisdictions¹² and is in accord with the Restatement.¹³

In the instant case the original actors knew that they had been negligent in allowing the gasoline to spill and that someone

⁹ "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." Restatement, Torts § 440 (1934).

¹⁰ *Medved v. Doolittle*, 220 Minn. 352, 19 N.W.2d 788 (1945).

¹¹ 325 Pa. 357, 191 Atl. 43 (1937).

¹² *Hillyard v. Utah By-Products Co.*, 263 P.2d 287 (Utah 1953); *Zelozewski v. Sloan*, 375 Pa. 360, 100 A.2d 480 (1953); *Edgerton v. Norfolk Southern Bus Corp.*, 187 Va. 642, 47 S.E.2d 409 (1948); *Medved v. Doolittle*, 220 Minn. 352, 19 N.W.2d 788 (1945); *Johnson v. Cone*, 112 Vt. 459, 28 A.2d 384 (1942).

¹³ In a footnote in *Kline v. Moyer* it was pointed out that the conduct was "extraordinarily negligent" within the rule laid down in Restatement, Torts § 447c (1934), which provides that, "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if... the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent." And in comment e of § 447, the Restatement continues. "The words extraordinarily negligent denote the fact that men of ordinary experience and reasonable judgment, looking at the matter after the event and taking into account the prevalence of that 'occasional negligence, which is one of the incidents of human life,' would not regard it as extraordinary that the third person's intervening act should have been done in the negligent manner in which it was done. Since the third person's action is a product of the actor's negligent conduct, there is good reason for holding him responsible for its effects, even though it be done in a negligent manner, unless the nature or extent of the negligence is altogether unusual."

might be injured by a resulting fire. Had a pedestrian without knowledge of the situation thrown a lighted match into the danger area, there would be little doubt as to liability. However, to prevent such an injury the original actors summoned an instrumentality trained to cope with such a dangerous condition and whose duty it was to prevent such an injury. Yet that very instrumentality with knowledge of the dangerous condition negligently set the spark which turned the original actor's negligence into a blazing inferno.

Had the original actors not relied upon the training and experience of the firemen, they no doubt would have taken their own corrective measures by guarding the dangerous area. Since it is generally agreed that there are at least some limits to the tort liability of a negligent defendant and that the law does not make a negligent defendant an insurer against every possible future contingency, it would appear that the rule adopted in the first situation of the *Kline* case is a reasonable and proper approach to the rules of superseding causes and one which should be applicable to the instant case.

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