

**BUTTERFIELD RIDES AGAIN: PLAINTIFF'S  
NEGLIGENCE AS SUPERSEDING OR SOLE  
PROXIMATE CAUSE IN SYSTEMS OF PURE  
COMPARATIVE RESPONSIBILITY**

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I. INTRODUCTION

In the famous English case of *Butterfield v. Forrester*, the plaintiff left a pub at twilight and rode his horse “as fast as [he] could go . . . through the streets of Derby.”<sup>1</sup> As every first-year law student knows, he didn’t make it home on time. Instead, he crashed into a pole that had been placed across part of the road by the defendant, who was repairing his house. There was room to ride by the pole, and the pole could be seen at one hundred yards, but the plaintiff—while “there was no evidence of his being intoxicated at the time”—was “riding violently” and failed to avoid it.<sup>2</sup> In his suit for damages, he recovered nothing.

The case is commonly viewed as the genesis of the rule of contributory negligence as a complete bar to recovery against a negligent defendant,<sup>3</sup> as Lord Ellenborough explained the result, “[o]ne person

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1. 103 Eng. Rep. 926, 927 (K.B. 1809).

2. *Id.* at 927.

3. Writing a century after *Butterfield*, torts scholar Francis Bohlen found the doctrine had been used in two earlier cases, *Cruden v. Fentham*, 2 Esp. 685, 170 Eng. Rep. 496 (1798), and *Clay v. Wood*, 5 Esp. 44, 170 Eng. Rep.

being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."<sup>4</sup> Across the Atlantic, this reasoning found favor,<sup>5</sup> and in most states, for a century and a half or so, the rule obtained: If a plaintiff were negligent to even the slightest degree, and that negligence was a cause of plaintiff's harm, no recovery could be had, even against an admittedly negligent defendant whose act was also a causal factor in plaintiff's harm. These later courts "may have given greater scope to the *Butterfield* decision than its various authors intended,"<sup>6</sup> regarding the complete bar rule as consonant with the era's dominant notions of "[f]ree will, personal responsibility, and liberty."<sup>7</sup> Every person bore the responsibility for his own safety, and breach of that duty to one's self was fatal to any attempt to blame one's injury on another.<sup>8</sup> It was also said that a plaintiff was barred on grounds of "unclean hands," or as a kind of punishment for his own careless conduct.<sup>9</sup>

Barring the slightly negligent plaintiff from all recovery is a harsh and inflexible result,<sup>10</sup> and was recognized as such not too

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732 (K.B. 1803). See Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908), reprinted in SELECTED ESSAYS ON THE LAW OF TORTS 469, 469 (Harvard Law Review Association 1924). He noted that in none of these cases did the judges appear to believe they were announcing a new or radical rule; rather, in all three cases, "[t]hat a plaintiff who by his own misconduct in conjunction with that of the defendant has brought harm upon himself, cannot recover damages, is stated as a well-settled rule." *Id.*

4. *Butterfield*, 103 Eng. Rep. at 927.

5. *Butterfield* was first relied upon as authority in this country to bar a negligent plaintiff from all recovery in *Smith v. Smith*, 19 Mass. (2 Pick.) 621, 624-25 (1824).

6. VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1-2(a), at 5 (3d ed. 1994).

7. HENRY WOODS, *COMPARATIVE FAULT* § 1:4, at 9 (1978).

8. See Bohlen, *supra* note 3, at 490.

9. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 65, at 453 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

10. This was especially evident in the railroad crossing cases, where the hapless person struck by a train while crossing the tracks was often barred from recovery as a matter of law on the ground that he or she obviously failed to stop, look, and listen, and no reasonable jury could find such conduct non-negligent. See, e.g., *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927); *Chesapeake & Ohio Ry. Co. v. Barlow*, 156 S.E. 397 (Va. 1931);

many decades after its appearance in this country. This led to two distinct developments. First, courts began to craft ameliorating doctrines, rules to be applied to particular fact patterns that would allow plaintiffs full recovery despite plaintiffs' negligence. Perhaps the best-known example is the doctrine of "last clear chance,"<sup>11</sup> which originated in the 1842 English case of *Davies v. Mann*,<sup>12</sup> involving an ass negligently left fettered in the middle of the road. Courts applied this doctrine in hundreds of American railroad-crossing cases in the early twentieth century to allow helpless plaintiffs (or their estates) to recover against railroads whose engineers had, but failed to capitalize upon, the "last clear chance" to avoid a collision.<sup>13</sup> Other common situations under which a negligent plaintiff could recover full damages included those when the defendant's conduct was wanton, reckless, or intentional,<sup>14</sup> or when the negligent plaintiff was at-

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Chesapeake & Ohio Ry. Co. v. Hall's Adm'r, 63 S.E. 1007 (Va. 1909); *Tesch v. Milwaukee Elec. Ry. & Light Co.*, 84 N.W. 823 (Wis. 1901); *see also* *Norfolk & W. R.R. Co. v. Harman*, 8 S.E. 251, 257-59 (Va. 1887) (holding that the negligence of the "semi-intoxicat[ed]" decedent struck and killed by a train traveling slowly along the tracks was "the sole proximate cause" of his death).

11. While modern sources consistently present the doctrine of last clear chance as an ameliorating doctrine, *see, e.g.*, DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION* 244 (3d ed. 1997), it was earlier regarded not as an exception to the rule of contributory negligence, but rather as an application of the same rule that was one of the underpinnings of *Butterfield*: that the law denominates as the proximate cause of injury a breach of one person's duty to avoid the consequences of another's negligence. *See, e.g.*, *Dutcher v. Wabash Ry. Co.*, 145 S.W. 63, 80 (Mo. 1912) (Woodson, J., dissenting) ("[T]he rule of law is laid down with perfect correctness in the case of *Butterfield v. Forester* that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercis[e] of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them he is the author of his own wrong."); *see also* William Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1890), *reprinted in* *SELECTED ESSAYS ON THE LAW OF TORTS* 543, 553 (Harvard Law Review Ass'n 1924) (giving the same interpretation).

12. 152 Eng. Rep. 588 (Ex. D. 1842).

13. *See infra* notes 38-46 and accompanying text.

14. *See, e.g.*, *Boyette v. Bradley*, 100 So. 647, 652 (Ala. 1924) ("It is established in this jurisdiction that there can be no plea of contributory negligence to a count charging wantonness, or a willful injury."); *Fonda v. St. Paul City Ry. Co.*, 74 N.W. 166, 170 (Minn. 1898) ("Where the defendant's acts are willful and intentional, the negligence of the plaintiff, if any, is no longer deemed in

tempting to rescue some third person whom the defendant had left in a precarious situation.<sup>15</sup> In a second and more radical development that gathered momentum much later, legislatures and courts began to reject the very rule itself, adopting allocation schemes under which juries were instructed to compare the negligence of plaintiffs and defendants.<sup>16</sup>

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law a proximate cause of the injury. In such cases the willful and intentional acts of the defendant are deemed the sole proximate cause.”).

15. See, e.g., *Eckert v. Long Island R.R.*, 43 N.Y. 502, 506 (1870) (“The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness.”). For a modern example, see *Oulette v. Carde*, 612 A.2d 687, 690 (R.I. 1992), holding that a defendant could not use the rescuer’s negligence to reduce his damages in a pure comparative state.

16. Scholars trace the first “comparative negligence” scheme to a series of medieval European sea codes which gradually evolved the concept. The fourteenth century compilation of the admiralty court at Oleron, an island off the west coast of France, provided for divided damages in the event of collisions between vessels. One provision stated that for certain kinds of accidents, damages were to be divided in accordance with expert opinion. See WOODS, *supra* note 7, § 1:10, at 19 (citing Ernest Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 223 (1950)). In the United States, the first true comparative negligence scheme was adopted by Congress in 1908 in the second Federal Employers Liability Act, Pub. L. No. 100, 35 Stat. 65 (codified as amended at 45 U.S.C. §§ 51-60 (1994)), an Act covering railroad employees’ on-the-job injuries. Pure comparative negligence was adopted for personal injuries to seamen in the 1920 Jones Act, Pub. L. No. 261, 41 Stat. 988 (codified as amended at 46 U.S.C. § 688 (1994)), and the 1920 Death on the High Seas Act, Pub. L. No. 165, 41 Stat. 537 (codified as amended at 46 U.S.C. § 766 (1994)).

At the state level, in the 1858 case of *Galena & Chicago Union R.R. Co. v. Jacobs*, 20 Ill. 478 (1858), Illinois adopted a system under which a negligent plaintiff could recover fully “wherever it . . . appear[ed] that the plaintiff’s negligence [was] comparatively slight, and that of defendant gross.” *Id.* at 497. Three other states (Oregon, Wisconsin, and Tennessee) adopted then abandoned similar schemes in the late nineteenth century. See SCHWARTZ, *supra* note 6, § 1-5(a), at 18-19. Comparative negligence was first adopted for railroad injuries in Georgia in 1860, and several other states followed suit, with respect to railroad injuries only. See *id.* The first state to adopt a comprehensive comparative negligence scheme for all personal injury torts was Mississippi, in 1910, followed by Nebraska in 1913, Wisconsin in 1931, South Dakota in 1941, and Arkansas in 1955. See *id.* § 1.4, at 14-16. The explosion of adoptions occurred in the late 1960s through mid-1970s, during which almost half the states joined the original six in adopting generally-applicable compara-

Most scholarly commentators then and now lauded “pure” comparative responsibility,<sup>17</sup> under which the plaintiff may recover from a negligent defendant regardless of the extent of plaintiff’s own negligence, as the most logical and just approach to the problem—indeed, as the final evolutionary stage of the question of allocation of responsibility in personal injury tort suits.<sup>18</sup> Under such a scheme, in theory at least, a defendant who is but one percent responsible still pays one percent of the plaintiff’s damages, since liability is deter-

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tive negligence or comparative fault regimes. *See id.* § 1.4, at 12-17. Forty-six states now follow some form of comparative scheme.

17. The traditional term “comparative negligence” gradually gave way to the term “comparative fault” to reflect the fact that kinds of misconduct other than negligence are often subject to comparison under the various state schemes. We appear to be moving toward use of the term “comparative responsibility,” reflecting the fact that many jurisdictions allow comparison of things beyond fault (such as causation) or of conduct where fault is not an issue (i.e., liability on the basis of strict liability). *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (Proposed Final Draft, Mar. 22, 1999) (adopted by American Law Institute on May 18, 1999) [hereinafter RESTATEMENT (THIRD): APPORTIONMENT] (consistently using the term “comparative responsibility”). In keeping with this trend, when this Article makes reference to comparative systems generally, the term “comparative responsibility” is most often used, unless it seems more precise to use another.

18. *See, e.g.*, PROSSER & KEETON, *supra* note 9, § 67, at 471-73 (calling pure comparison the “simplest” system, lauding its “flexibility and relative simplicity”); SCHWARTZ, *supra* note 6, § 22-3, at 448-54 (discussing the search for the “best comparative fault system” and concluding that “only pure comparative negligence distributes responsibility according to fault of the respective parties”); STUART M. SPEISER ET. AL., THE AMERICAN LAW OF TORTS § 11:9, at 413 (1986) (“As demonstrated in the reasoning of the courts that have adopted the pure form, it is the fairest, most logical and simplest to administer of all available systems.”); William A. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 494 (1953) (denouncing the adoption of modified comparison as “pure political compromise”). The American Law Institute adopts pure comparative responsibility as the proper allocation standard in the new torts Restatement, which provides that plaintiff’s negligence that is a legal cause of plaintiff’s injury “reduces the plaintiff’s responsibility in proportion to the share of responsibility the factfinder assigns to the plaintiff.” RESTATEMENT (THIRD): APPORTIONMENT, *supra* note 17, § 7. The Uniform Comparative Fault Act, promulgated by the National Conference on Uniform State Laws in 1977, also endorses pure comparative fault. *See* UNIF. COMPARATIVE FAULT ACT § 1, 12 U.L.A. 127 (1977), *reprinted in* SCHWARTZ, *supra* note 6, § 22-4.

mined by degree of responsibility, whatever that degree is found to be. Despite the popularity of this idea among legal theorists, the wave of adoptions of pure comparative systems between 1973 and 1984—during which time a dozen states adopted such a system<sup>19</sup>—proved short-lived, and no state has adopted a pure form since 1984. Further, three states that had adopted a pure form have replaced it with a modified form in whole<sup>20</sup> or part.<sup>21</sup> As of now, roughly two-thirds of the states adhere to a modified comparative scheme.<sup>22</sup>

There are, of course, a number of reasons why pure comparative responsibility has never swept the nation.<sup>23</sup> As one commentator summarized the critics' views, the pure system is

simply too extreme. . . . Although the contributory negli-

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19. The states that adopted pure comparative negligence, with year of first adoption, are: Mississippi (1910); Arkansas (1955) (repealed in favor of modified, 1957); Rhode Island (1971); Washington (1973); Florida (1973); New York (1975); California (1975); Alaska (1975); Louisiana (1979); Michigan (1979); Illinois (1981) (repealed in favor of modified, 1986); New Mexico (1981); Missouri (1983); Arizona (1984); Kentucky (1984).

20. Arkansas, which followed pure comparative negligence between 1955 and 1957, and Illinois, which followed pure comparative negligence between 1981 and 1986, both follow a modified form today.

21. Michigan, which followed a pure system between 1979 and 1996, now follows a modified comparative scheme for non-economic damages and a pure scheme for economic damages. See MICH. COMP. LAWS ANN. § 600.2959 (West 1996) (providing that if a plaintiff's percentage of fault is greater than the defendant's, "the court shall reduce economic damages by the percentage of comparative fault of the [plaintiff] . . . and noneconomic damages shall not be awarded").

22. Under a "modified" form of comparative responsibility, a plaintiff's claim is barred only if plaintiff's responsibility or fault exceeds a certain level in comparison to defendant's. All but one of these states uses either a "greater than" scheme, under which a plaintiff is barred from recovery only if the plaintiff's responsibility or fault is greater than defendant's, or a "greater than or equal to" scheme, under which a plaintiff is barred only if the plaintiff's responsibility or fault is equal to or greater than that of the defendant. That one state, South Dakota, follows a statutory "slight/gross" scheme, under which a plaintiff's negligence "shall not bar a recovery when . . . slight in comparison with the negligence of the defendant." S.D. CODIFIED LAWS § 20-9-2 (Michie 1995).

23. Despite its minority position in terms of numbers of states, it may well be that "the pure form of comparative negligence now affects more litigants than any other system," given its adoption by some of the most populous states. WOODS, *supra* note 7, § 4:1, at 77.

gence rule created inequity by placing too stringent a line on plaintiff's fault, pure comparative negligence posits no line at all. By removing all barriers to the highly culpable individual, the pure system erodes both the moral foundation of the fault system and the notion of self-responsibility which, many believe, still needs nurturing in modern tort law.<sup>24</sup>

West Virginia's high court, rejecting a plaintiff's argument that it should adopt a pure system of comparison, found it "difficult, on theoretical grounds alone, to rationalize a system which permits a party who is 95 percent at fault to have his day in court as a plaintiff because he is 5 percent fault-free."<sup>25</sup> All of these criticisms may be summed up by saying that truly pure comparison may not be the final evolutionary stage of allocation in the real world of tort adjudication. That is, the logical purity of any allocation scheme that would allow a plaintiff who is 99% responsible (or at fault) to recover a large sum of money from a defendant who is 1% responsible is marred significantly by the intense disdain most people—judges included—would generally exhibit for such a result.<sup>26</sup> One widespread judicial reaction to this reality is the subject of this Article: the retention, in all but one of the pure comparative states,<sup>27</sup> of a rule that allows defendants to assert that the plaintiff's negligence constitutes an intervening superseding cause or sole proximate cause of plaintiff's harm, thus barring the claim entirely before any comparison can be done.

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24. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 249 (1990).

25. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 883 (W. Va. 1979).

26. This is, of course, simply another illustration of the wisdom of Judge Andrews's oft-quoted comment about proximate cause: "Any philosophical doctrine of causation does not help us. . . . This is not logic. It is practical politics." *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

27. The New Mexico Supreme Court recently held that "the doctrine of independent intervening cause does not apply to a plaintiff's negligence." *Torres v. El Paso Elec. Co.*, 987 P.2d 386, 394 (N.M. 1999). While some New Mexico cases prior to *Torres* utilized the doctrine of "sole proximate cause" to bar a negligent plaintiff's recovery entirely, *see, e.g., Armstrong v. Industrial Elec. & Equip. Serv.*, 639 P.2d 81, 85 (N.M. Ct. App. 1981), the language of *Torres* would appear to severely undercut, if not eliminate, any such usage in the future. New Mexico may thus be characterized as the *purest* of the pure states.

The continued availability of these defense arguments evidences that many judges exhibit significant ambivalence towards pure comparative responsibility and insist on retaining some ameliorating doctrines to soften the sometimes-harsh effects of pure comparison on *defendants* in particular cases.

It is certainly true that virtually all states<sup>28</sup> have clearly repudiated the holding of *Butterfield* in its most extreme form, and thus a plaintiff may no longer be barred from all recovery even if only slightly negligent, on the simple ground that a negligent plaintiff may not recover anything against a negligent defendant. However, when *Butterfield* is reconstituted with facts intact, facts that led Justice Bayley to conclude that the rider could not recover because “the accident appeared to happen entirely from his own fault,”<sup>29</sup> it has not been truly repudiated in *any* state, regardless of what contributory or comparative scheme it uses. The plaintiff who rides full-blast into a pole lying halfway across the road when the pole can be seen from a great distance and where there is plenty of room to go around it will clearly not recover in one of the few states that adheres to the old contributory negligence scheme. And in those thirty-four or so states that follow a modified form of comparative responsibility, this plaintiff will probably not recover, either, since most reasonable juries will likely conclude that the plaintiff was more at fault than the defendant who placed the pole halfway across the road. Finally, in the pure comparative states, in theory the plaintiff should be able to recover even if the plaintiff is 95% or more at fault. But, as this Article points out, defendants in all but one of the pure states may well escape all liability on these facts by arguing that the plaintiff’s conduct is so extraordinary, so gross in comparison with defendant’s negligence, as to constitute a superseding or sole proximate cause of the plaintiff’s own harm. That is, while pure comparative responsibility appears to allow an overwhelmingly negligent plaintiff—just like the plaintiff in *Butterfield*—to recover a small percentage of damages, the doctrines of superseding or sole proximate cause often

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28. Contributory negligence continues to function as a complete bar to plaintiffs’ recoveries in Alabama, Maryland, North Carolina, Virginia, and the District of Columbia.

29. *Butterfield*, 103 Eng. Rep. at 927.

function to prevent such a result and to entirely bar the claim. Further, as this Article argues, the phenomenon of the pure states' courts' widespread use of these doctrines to bar overwhelmingly negligent plaintiffs does not *undercut* systems of pure comparative responsibility, as most commentators have argued; rather, these doctrines serve as useful ameliorating doctrines or safety valves that help *preserve* these "pure" systems.

Leading up to a reiteration of this conclusion, this Article first provides a brief history of the use of superseding or sole proximate cause as a rationale to bar plaintiffs in the pre-comparative era. Part III then provides a current jurisdictional survey, describing which states use the doctrine in this way and which do not. The final Part of the Article is a functional analysis, focusing on pure comparative states, discussing the three main functions of the doctrine in this context: the ameliorative function, the proxy function, and the judge and jury functions.

## II. PLAINTIFF'S NEGLIGENCE AS SUPERSEDING OR SOLE PROXIMATE CAUSE: A BRIEF HISTORY

When contributory negligence barred a plaintiff's claim entirely, and a single plaintiff sued a single defendant, there could be at most one *proximate* cause of the harm. When the issue was whether the plaintiff's negligence barred the claim, courts often analyzed the case in terms of whether the plaintiff's act or the defendant's act was *the* legally significant cause of the harm. "The maxim of the law here applicable," said the Virginia Supreme Court in 1899,

is that in law the immediate, and not the remote, cause of any event is regarded. In other words, the law always refers the injury to the proximate, and not to the remote, cause. . . . [T]he law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote.<sup>30</sup>

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30. *Fowlks v. Southern Ry. Co.*, 32 S.E. 464, 465 (Va. 1899). The distinction between "remote" and "proximate" causes traces back to Lord Bacon's *Maxims of the Law*: "In law, look to proximate, not remote, causes." MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE*

Sir Frederick Pollock, perhaps the most respected of the early torts treatise writers, put it succinctly in the context of a single plaintiff–single defendant situation:

Now I may be negligent, and my negligence may be the occasion of some one suffering harm, and yet the immediate cause of the damage may be not my want of care but his own. Had I been careful to begin with, he would not have been in danger; but had he, being so put in danger, used reasonable care for his own safety or that of his property, the damage would still not have happened. Thus my original negligence is a comparatively remote cause of the harm, and as things turn out the proximate cause is the sufferer's own fault, or rather . . . he cannot ascribe it to the fault of another.<sup>31</sup>

The idea that a plaintiff's negligent act barred his claim because it, not the defendant's act, was *the* proximate cause of the plaintiff's harm is fairly traceable to *Butterfield v. Forrester*.<sup>32</sup> As Justice Bayley concluded in holding against the negligent plaintiff, "the accident appeared to happen entirely from his own fault."<sup>33</sup> It is not surprising, then, that many early cases fell naturally into using the basically interchangeable nomenclature of superseding cause,<sup>34</sup> *the*

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CRISIS OF LEGAL ORTHODOXY 52 (1992) (quoting F. BACON, MAXIMS OF THE LAW, in 7 WORKS 307, 327 (J. Spedding et. al. eds., 1879)).

31. FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 566-69 (New Am. ed. 1894).

32. 103 Eng. Rep. 926 (K.B. 1809).

33. *Id.* at 927.

34. Pre-comparative era cases often stated the rule of superseding cause thusly:

Whenever a new cause [independent intervening circumstance] intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, and which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action.

*Kramer v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 276 N.W. 113, 118 (Wis. 1937) (brackets in original) (quoting *Morey v. Lake Superior Terminal & Transfer Ry. Co.*, 103 N.W. 271, 273 (Wis. 1905)). The *Restatement (Second) of Torts* defines a superseding cause as "an act of a third person or other

proximate cause, and “sole proximate cause” when finding for either the plaintiff or the defendant in a negligence case in which both the plaintiff and the defendant allegedly acted negligently.<sup>35</sup> It was

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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 (SECOND) OF TORTS § 440 (1965) [hereinafter RESTATEMENT (SECOND)]. Intervening force is defined as “one which actively operates in producing harm to another after the actor’s negligent act or omission has been committed.” *Id.* § 441.

35. The terms “sole proximate cause” and “superseding intervening cause” are not necessarily synonymous in all contexts. A plaintiff’s superseding cause is always the sole proximate cause, because a court deems it so simply by using that label. But a sole proximate cause is not always a superseding cause; sole proximate cause may mean that there is only one act of negligence, or even one actual cause of the plaintiff’s harm, while superseding cause analysis requires an antecedent negligent act that is also an actual cause of the harm. *See id.* §§ 440-41. However, in this Article, the terms are generally used synonymously unless an explicit distinction is drawn, reflecting courts’ frequent use of the terms interchangeably to explain a holding that either the plaintiff or one defendant is completely legally responsible for the plaintiff’s injury. *Cf.* 63 AM. JUR. 2D *Products Liability* § 28 (1996) (noting that “[s]ome courts have characterized a superseding cause as being the ‘sole cause’ of the injury”). They have probably done so in part because two acts of negligence rarely if ever occur at precisely the same time, making either (or both) terms properly applicable. In any event, lumping the terms together is quite common in courts of today and yesterday. For example, in *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830 (1996), the Supreme Court said, “[T]he legal question that we took this case to address is whether a plaintiff in admiralty that is the superseding and thus the sole proximate cause of its own injury can recover part of its damages from tortfeasors” who were also “causes in fact of the plaintiff’s injury.” *Id.* at 840. Recent decisions applying state law also typically use the two terms interchangeably in this context. *See, e.g.*, *Grant v. Westinghouse Elec. Corp.*, 877 F. Supp. 806, 817 (E.D.N.Y. 1995) (stating that under New York law, “[f]or an intervening act or cause to be deemed superseding (i.e., designated as the sole cause of an occurrence) it must have been ‘unforeseeable’”); *George v. State*, 674 N.Y.S.2d 742, 743 (1998) (holding that the injured plaintiff’s negligent conduct was “the sole and superseding proximate cause of his injuries”). Using sole proximate cause as a synonym for superseding cause has a long history. As the Virginia Supreme Court put it in a 1910 case in which it barred recovery for a passenger who negligently alighted from a moving train:

Where an efficient producing cause for injuries is found, it will be considered the proximate cause, unless another cause or causes, not incident to but independent of it, are shown to have intervened and produced the injury. The question must always be, therefore, whether there was any intermediate cause disconnected from the primary act and self-operating, which produced the injury. . . . Where this ques-

common in the pre-comparative era to explain contributory negligence in terms of superseding cause, labeling plaintiff's negligence as a new and independent force intervening between the negligent act of defendant and plaintiff's injury,<sup>36</sup> or as the sole proximate cause of the plaintiff's harm,<sup>37</sup> or both.<sup>38</sup> Similarly, cases often explained last clear chance rulings in terms of defendant's negligence acting as an intervening superseding cause<sup>39</sup> or the sole proximate cause<sup>40</sup> of the

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tion can be answered in the affirmative, the independent and intervening cause will be regarded as the proximate cause, and the author of the original act discharged.

*Chesapeake & Ohio Ry. Co. v. Wills*, 68 S.E. 395, 397 (Va. 1910).

36. *See, e.g.*, *Hayes v. Missouri Pac. R.R. Co.*, 186 S.W.2d 780, 783 (Ark. 1945) (ruling that worker's act in trying to put out a fire without explicit directions to do so intervened between the railroad's negligence in starting the fire and his injury); *Menden v. Wisconsin Elec. Power Co.*, 2 N.W.2d 856, 858 (Wis. 1942) (holding decedent's act of picking up live electric wires constituted an intervening cause, rendering defendant power company's negligence in failing to maintain the wires in a safe condition a remote cause); *see also* PROSSER & KEETON, *supra* note 9, at 452.

37. *See, e.g.*, *Missouri Pac. R.R. Co. v. Merrell*, 143 S.W.2d 51, 54 (Ark. 1940) (holding plaintiff, struck by train that had not turned on its headlights, to be "sole proximate cause" of his own injury); *Denver & Rio Grande R.R. Co. v. Buffehr*, 69 P. 582, 585 (Colo. 1902) (holding against a pedestrian struck by a train, saying, "if plaintiff's own negligence . . . turns out to be the sole proximate or direct cause of the injury, she is not entitled to recover, whatever the cause of action be"); *Peluso v. De Pasquale*, 182 A. 405, 406 (Conn. 1936) (holding the negligence of the fourteen-year-old plaintiff in riding his scooter across the street was "the sole proximate cause of the accident," thus barring recovery).

38. *See, e.g.*, *Bean v. Ross Mfg. Co.*, 344 S.W.2d 18, 28 (Mo. 1961) (characterizing defendant's argument that "the sole proximate cause of plaintiff's injury" was "his own intervening acts," as "merely a reconsideration of the question of contributory negligence and, to a lesser degree, the existence of defendant's own negligence").

39. *See, e.g.*, *Boyd v. Geary*, 12 A.2d 644, 646 (Conn. 1940) (holding that the point of the last clear chance doctrine is "eliminating antecedent negligence of the plaintiff as a bar to recovery where it has been superseded by the defendant's subsequent negligence") (quoting *Corey v. Phillips*, 10 A.2d 370, 372 (Conn. 1939)).

40. *See, e.g.*, *Memphis & Charleston R.R. Co. v. Martin*, 30 So. 827, 830 (Ala. 1901) (affirming jury verdict for plaintiff struck by train, on the ground that her negligence "did not proximately contribute to her death, but merely produced a situation upon which the negligence of the engineer operated as the sole proximate cause to the infliction of her mortal hurts"); *Indianapolis Traction & Terminal Co. v. Croly*, 96 N.E. 973 (Ind. Ct. App. 1911) (holding neg-

plaintiff's harm, or an amalgam of the two.<sup>41</sup> As an early Connecticut case put it, when a negligent plaintiff, unconscious of the danger, was struck by a train whose motorman had the last clear chance to avoid the collision, plaintiff was relieved of the consequences of his negligence "because the negligence of the motorman in failing to avoid the accident intervened and became its proximate cause."<sup>42</sup> Plaintiff's negligence "ceased, in a legal sense, to be a proximate cause of the accident."<sup>43</sup> Many cases so reasoned on "last clear chance" facts, without ever mentioning "last clear chance." For example, in *Seward v. Minneapolis Street Railway Co.*,<sup>44</sup> plaintiff truck driver parked on an incline and set his hand brake, knowing that it was "in defective condition."<sup>45</sup> Because the delivery truck was carrying flowers that day, he left the motor running to maintain a proper temperature. After walking some distance from the truck, he noticed that it was rolling downhill towards a moving streetcar. He ran down the hill, and in an attempt to reenter the truck, he was seriously in-

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ligent plaintiff can recover where "the injury was caused solely by the failure of the defendant to take advantage of the last clear chance of avoiding the injury," making the defendant's breach of duty "the sole proximate cause" of plaintiff's harm); *Dutcher v. Wabash R.R. Co.*, 145 S.W. 63, 79-83 (Mo. 1912) (containing lengthy discussion of last clear chance as defendant's sole proximate cause); *Dent v. Bellows Falls & Saxtons River St. Ry. Co.*, 116 A. 83, 86 (Vt. 1922) (asserting that negligence of defendant "in not averting the accident after the peril is or should have been discovered, becomes the sole proximate cause of the injury").

41. See, e.g., *Kinderavich v. Palmer*, 15 A.2d 83, 89 (Conn. 1940) (concluding negligent plaintiff can recover where defendant "introduces into the situation a new and independent act of negligence which supersedes that of the plaintiff and becomes the sole proximate cause of the accident"); *Seay v. Southern Ry.*, 31 S.E.2d 133, 138 (S.C. 1944) (explaining result in last clear chance "is accomplished by characterizing the negligence of a defendant, if it intervenes between the negligence of the plaintiff and the accident, as the sole proximate cause of the injury, and the plaintiff's antecedent negligence as a condition or remote cause"); *Riedel v. Wheeling Traction Co.*, 71 S.E. 174, 175 (W. Va. 1911) (stating negligent plaintiff who attempted to cross train tracks may recover, because "[i]f the defendant was guilty of a subsequent act of negligence . . . such supervening negligence becomes, in law, the proximate cause of the injury").

42. *Nehring v. Connecticut Co.*, 84 A. 524, 527 (Conn. 1912).

43. *Id.*

44. 25 N.W.2d 221 (Minn. 1946).

45. *Id.* at 222.

jured. The defendant argued contributory negligence and won a jury verdict. Plaintiff's motion for a new trial was denied, but the Supreme Court of Minnesota reversed, finding that the trial court's instructions on proximate cause were erroneous. Specifically, the court said that because the streetcar's motorman might have been able to prevent the collision by using due care, the rule of "intervening efficient cause" might have resulted in a plaintiff's verdict.<sup>46</sup> "That rule, where applicable," said the court, "eliminates the prior act of negligence as a proximate cause and establishes it in the status of an 'occasion or condition.'"<sup>47</sup>

In part, these usages reflect an early preoccupation with finding a single cause in all cases.<sup>48</sup> But they can also be seen as simply a logical consequence of the widespread acceptance of an all-or-nothing system where, in a basic two-party situation, only one would bear the entire loss. To say that the plaintiff's negligent act was a superseding or sole proximate cause was just another way to say that the defendant was not legally responsible for the plaintiff's injury.<sup>49</sup>

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46. *Id.* at 223.

47. *Id.*

48. *See, e.g.*, HORWITZ, *supra* note 30, at 52-60 (discussing the evolution of the idea that "above all, it was necessary to find a single scientific cause and thus a single responsible defendant"); WOODS, *supra* note 7, § 1:2, at 5 (quoting 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 462 (2d ed. 1937) (discussing a nineteenth and early twentieth century renaissance of the medieval theory "that liability is based on an act which causes damage" rather than on fault)); Lord Wright of Durley, *Contributory Negligence*, 13 MOD. L. REV. 2, 5 (1950), *cited in* PROSSER & KEETON, *supra* note 9, § 65, at 452 n.14.

49. A good example of this is found in *Corrigan v. Portland Traction Co.*, 73 P.2d 378 (Or. 1937), where the court ordered dismissal of the case of a plaintiff who was struck by a truck after alighting from defendant's bus. Defendant argued that the plaintiff negligently failed to observe the approaching truck, "and that such negligence upon the part of the plaintiff was the sole proximate cause of his injury." *Id.* at 378. The court found "conclusive" a case that had held that "the carrier is not liable for an injury resulting from an intervening cause over which the carrier has no control," but also said that the defendant was not negligent: "There was no evidence tending to show that the boy was not let off in a place of safety or that he was not let off at any point other than the regular place for the discharge of passengers . . . ." *Id.* at 379. Clearly, the court used the doctrines of sole proximate cause and superseding cause here as synonyms—or explanations—for holding that defendant breached no duty. *See also, e.g.*, *Village of Lockport v. Licht*, 77 N.E. 581, 582-83 (Ill. 1906) (on facts similar to *Butterfield*, denying recovery to plaintiff

To label the defendant's negligent act a superseding or sole proximate cause was a proxy for the conclusion that the plaintiff had

established a prima facie case against the defendant<sup>50</sup> and was not contributorily negligent.<sup>51</sup>

In short, in the pre-comparative era, the doctrines of sole proximate cause and intervening superseding cause functioned as convenient shorthand to explain an all-or-nothing result in a two-party situation. A defendant who missed the last clear chance to save a helpless negligent plaintiff would be held wholly liable, perhaps because his negligence was the "sole proximate cause" of the harm, perhaps because his negligence "intervened" between the plaintiff's negligence and the injury. A plaintiff who was contributorily negligent would be given no recovery whatsoever, perhaps because his negligence was the "sole proximate cause" of his injury, perhaps because his negligence "intervened" between the defendant's negligence and the injury. While these usages added nothing to the law, substantively, neither were they particularly offensive to it. There were many consistent doctrinal routes, all leading to the same result.

Gradually, the common law of intervening superseding cause crystallized into fairly recognizable rules, most of which are still applied today. An intervening cause, one that comes into operation af-

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on alternative grounds of no negligence by defendant and contributory negligence by plaintiff that was the "sole cause of the accident").

50. See, e.g., *Williams v. Edmunds*, 42 N.W. 534, 535 (Mich. 1889) ("[t]he plaintiff must show that the sole proximate cause of the accident was the negligence of the defendant's servant" in order to recover); *Norfolk & Western Ry. Co. v. Sink's Ex'r*, 87 S.E. 740, 743 (Va. 1916) (plaintiff has burden of proving that defendant's negligence was the "sole proximate cause of the accident").

51. See, e.g., *Burk v. Extrafine Bread Bakery*, 208 Cal. 105, 111-12, 280 P. 522, 525 (1929) (holding the trial court's instruction to the jury that it should render a verdict for plaintiff if it finds that defendant's negligence was the "sole proximate cause" of plaintiff's injuries adequately informed the jury "on the law of proximate cause and contributory negligence"); *Woodhead v. Wilkinson*, 181 Cal. 599, 602, 185 P. 851, 853 (1919) (holding that the trial court's explicit finding that the defendant's negligence was "the sole and proximate cause" of plaintiff's injuries equates to a finding that the plaintiff was not contributorily negligent); *Gerow v. Hawkins*, 192 N.E. 713 (Ind. Ct. App. 1934) (same).

ter the defendant's negligence has been committed,<sup>52</sup> becomes a "superseding cause," cutting off the defendant's liability, when the intervening act, or the type of harm resulting from that intervening act, is not reasonably foreseeable.<sup>53</sup> The Restatement adds that "[t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm,"<sup>54</sup> and neither is an intervening act superseding "[w]here the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force."<sup>55</sup> The Restatement itself does not explicitly say whether a plaintiff's negligence can constitute a superseding cause or be labeled the sole proximate cause of the plaintiff's own harm.<sup>56</sup>

### III. A CURRENT JURISDICTIONAL SURVEY

Jurisdictions today disagree over the propriety of labeling a plaintiff's misconduct a superseding or sole proximate cause of the plaintiff's injury. Further, within several jurisdictions, the case law is conflicting, with some courts approving of such an analysis and others disapproving. And even within those states that have approved the practice, vigorous dissents are often filed that charge the majority with fundamental error.

What appears at first glance to be an utterly chaotic situation,

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52. See RESTATEMENT (SECOND), *supra* note 34, § 441.

53. See PROSSER & KEETON, *supra* note 9, § 44; 57A AM. JUR. 2D *Products Liability* § 652 (1989) ("The general rule . . . is that the intervening negligence of the plaintiff does not supersede prior negligent conduct by another as a proximate cause of an injury where the plaintiff's subsequent act was a reasonably foreseeable result of the defendant's negligence."). It is thus accurate to speak of the doctrine of intervening superseding cause as a "limiting principle" of the doctrine of proximate cause. See SPEISER ET AL., *supra* note 18, § 11:9, at 413.

54. RESTATEMENT (SECOND), *supra* note 34, § 443.

55. *Id.* § 442A.

56. The *Restatement (Second)* has sixteen sections on intervening and superseding cause. The clearest "road map" through these sections is SPEISER ET AL., *supra* note 18, §§ 11:9 to 12, at 413-24, although the authors note that the doctrine has "engendered hundreds of decisions; they have probably been decided correctly on a strictly factual, case-by-case, *ad hoc* basis—but their broad statements are exceedingly difficult to reconcile." *Id.* § 11:9, at 413 (emphasis added).

however, may not be. At least, there may be a good explanation for the split among jurisdictions. While twenty or so states utilize this doctrinal device against negligent plaintiffs, it is disproportionately used in those jurisdictions that have a pure form of comparative responsibility. Currently, eleven states follow such a pure scheme: Alaska,<sup>57</sup> California,<sup>58</sup> Florida,<sup>59</sup> Kentucky,<sup>60</sup> Louisiana,<sup>61</sup> Mississippi,<sup>62</sup> Missouri,<sup>63</sup> New Mexico,<sup>64</sup> New York,<sup>65</sup> Rhode Island,<sup>66</sup> and Washington.<sup>67</sup> Michigan follows a hybrid pure form, with economic damages subject to a pure comparison and non-economic damages to a "modified" comparison.<sup>68</sup> A pure form of comparative responsibility is also used in federal maritime cases (both collision/grounding cases and Jones Act/personal injury cases)<sup>69</sup> and Federal Employer Liability Act<sup>70</sup> cases.

Simple state counting shows that all but one of the pure states explicitly approve using superseding or sole proximate cause to bar plaintiffs' recoveries,<sup>71</sup> while only about a third of the modified states do. Pure states that have approved of using superseding cause to bar a negligent plaintiff include Alaska,<sup>72</sup> Florida,<sup>73</sup> Michigan,<sup>74</sup>

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57. See ALASKA STAT. §§ 09.17.060, -.080, -.090 (Michie 1998).

58. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

59. See FLA. STAT. ANN. § 768.81 (West 1997).

60. See KY. REV. STAT. ANN. § 411.182 (Michie 1992).

61. See LA. CIV. CODE ANN. art. 2323 (West 1997).

62. See MISS. CODE ANN. § 11-7-15 (1972).

63. See MO. ANN. STAT. § 537.765 (West 1988) (pure form for products liability cases); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983).

64. See *Scott v. Rizzo*, 634 P.2d 1234 (N.M. 1981).

65. See N.Y. C.P.L.R. 1411-1413 (McKinney 1997).

66. See R.I. GEN. LAWS § 9-20-4 (1997).

67. See WASH. REV. CODE ANN. § 4.22.005 (West 1988).

68. MICH. COMP. LAWS §§ 600.2957, -.2958, -.2959 (1996).

69. See *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (collision); Jones Act, 46 U.S.C. § 688 (1999); Death on the High Seas Act, 46 U.S.C. § 766 (1999) (personal injury).

70. 45 U.S.C. §§ 51-60 (1999).

71. New Mexico is that state. See *Torres v. El Paso Elec. Co.*, 987 P.2d 386 (N.M. 1999).

72. See, e.g., *State v. Kaatz*, 572 P.2d 775 (Alaska 1977) (stating that if a plaintiff's own conduct is a superseding cause of his harm, he cannot recover even though defendant owes him a duty of due care).

Missouri,<sup>75</sup> New York,<sup>76</sup> Rhode Island,<sup>77</sup> and Washington.<sup>78</sup> Puerto Rico, which follows pure comparative negligence, has also done so.<sup>79</sup> Another group of pure states have barred negligent plaintiffs on

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73. *See, e.g.*, *Ruiz v. Westbrooke Lake Homes, Inc.*, 559 So. 2d 1172, 1174 (Fla. Dist. Ct. App. 1990) (affirming summary judgment for defendant homeowners association on the ground that the volitional act of the injured child in jumping from the monkey bars superseded any negligence of the defendant and became the sole proximate cause of his harm); *see also* *Worthington v. United States*, 21 F.3d 399, 406 (11th Cir. 1994) (applying Florida law, finding piloting error by plaintiff not to be a superseding intervening cause on the ground that such error was "neither bizarre nor unforeseeable").

74. *See, e.g.*, *Warren v. Michigan Gas Util. Co.*, 283 N.W.2d 703, 706 (Mich. Ct. App. 1979) (approving standard "jury instructions on superseding intervening cause" in case alleging that sole proximate cause of plaintiff's injury was the negligence of the plaintiff and his employer).

75. *See, e.g.*, *Williams v. Birkeness*, 34 F.3d 695, 697 (8th Cir. 1994) (stating that under Missouri law, "a plaintiff's intervening conduct may be an independent cause absolving a negligent defendant from liability"); *Eidson v. Reproductive Health Servs.*, 863 S.W.2d 621, 626-27 (Mo. Ct. App. 1993) (same); *Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 661-62 (Mo. Ct. App. 1989) (same).

76. *See, e.g.*, *George v. State*, 674 N.Y.S.2d 742, 743 (App. Div. 1998) (plaintiff injured when he jumped eight feet down to help an injured co-worker held barred from recovery because his "gratuitous and unnecessary second jump was the sole and superseding proximate cause of his injuries"); *Lionarons v. General Elec. Co.*, 626 N.Y.S.2d 321 (1995) (swimmer who dove into shallow water in river barred from recovery against landowners because his dive was a superseding event); *Falcone v. City of N.Y.*, 566 N.Y.S.2d 352 (1991) (decendent's use of a volatile chemical to clean up water damage after the city's alleged negligence in causing flood was an extraordinary, unforeseeable act that severed causal connection between his death and the city's negligence); *Griffith v. City of N.Y.*, 507 N.Y.S.2d 445 (1986) (student's fall from an open window was an unforeseeable act that broke the causal chain between school's negligent conduct in denying him medical treatment and his injuries).

77. *See, e.g.*, *Kuras v. International Harvester Co.*, 820 F.2d 15, 18 (1st Cir. 1987) (applying Rhode Island law, affirming directed verdict for defendant on the ground that plaintiff's act of placing his hand into the spinning blade of a lawn mower was an intervening act that precluded his recovery).

78. *See, e.g.*, *Daly v. Lynch*, 600 P.2d 592, 596-97 (Wash. Ct. App. 1979) (affirming jury verdict against plaintiff on ground that plaintiff's act in improperly tucking in the bedspread on which she tripped was "an intervening cause which superseded the negligence" of the defendant).

79. *See, e.g.*, *Malave-Felix v. Volvo Car Corp.*, 946 F.2d 967, 973 (1st Cir. 1991) (applying Puerto Rico law, affirming a directed verdict for defendant on the ground that plaintiff's driving error was an "unforeseeable intervening cause").

the ground that the plaintiff's conduct was the sole proximate cause of the injury. This group includes California,<sup>80</sup> Louisiana,<sup>81</sup> Kentucky,<sup>82</sup> and Mississippi,<sup>83</sup> as well as courts in pure states that also approve the use of the superseding cause doctrine by name to bar plaintiffs' recovery.<sup>84</sup> In the pure federal law systems, superseding cause has been expressly approved in maritime cases involving collisions and groundings<sup>85</sup> and personal injuries.<sup>86</sup> In FELA

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80. *See, e.g.*, *Elder v. Pacific Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 664, 136 Cal. Rptr. 203, 210 (Ct. App. 1977) (affirming nonsuit for defendant on ground that plaintiff's conduct was sole proximate cause of workplace injury).

81. *See, e.g.*, *Reese v. Griffith*, 568 So. 2d 1146, 1150-51 (La. Ct. App. 1990) (affirming defense verdict where, despite defendant's negligence in maintaining apartment-building parking lot, plaintiff's own fault in taking shortcut because of bad weather was sole cause of his harm, "legally and factually"); *Martin v. Davis*, 478 So. 2d 949, 952 (La. Ct. App. 1985) (affirming jury's finding that plaintiff's negligent driving was sole proximate cause of accident).

82. *See, e.g.*, *Tennyson v. Brower*, 823 F. Supp. 421, 423-24 (E.D. Ky. 1993) (plaintiff's negligence may be "sole proximate cause" of harm, even though "superseding cause" has no application to a plaintiff's misconduct after the adoption of pure comparative fault); *Carlotta v. Warner*, 601 F. Supp. 749, 753-54 (E.D. Ky. 1985) (same).

83. *See, e.g.*, *Donald v. Triple S Well Serv., Inc.*, 708 So. 2d 1318, 1326 (Miss. 1998) (holding correct a standard jury instruction that provides if plaintiff's action was the sole proximate cause of his harm, he can recover nothing); *Braswell v. Economy Supply Co.*, 281 So. 2d 669, 677 (Miss. 1973) (partial abolition of assumption of risk does not prevent a defendant from arguing that the plaintiff's negligence was the sole proximate cause of his injury).

84. *See, e.g.*, *Hervey v. Alfonso*, 650 So. 2d 644, 646 (Fla. Dist. Ct. App. 1995) (noting in dictum that a defendant who proves that a plaintiff's negligence was the sole proximate cause of his injury is entitled to summary judgment) (citing *Bradford v. Bernstein*, 510 So. 2d 1204, 1206 (Fla. Dist. Ct. App. 1987)); *Armstrong v. Industrial Elec. & Equip. Serv.*, 639 P.2d 81, 85 (N.M. Ct. App. 1981) (stating that plaintiff in comparative negligence action is barred from recovery if his negligence is the "sole legal cause" of his damage); *Weller v. Colleges of the Senecas*, 635 N.Y.S.2d 990, 993-94 (1995) (plaintiff's conduct in riding bicycle on path between trees after dark may constitute sole proximate cause of harm, even if it was not primary assumption of risk); *Brashear v. Puget Sound Power & Light Co.*, 667 P.2d 78, 80-81 (Wash. 1983) (reinstating jury finding, based on "sole proximate cause" instruction, that plaintiff's own conduct when he fell from a power pole, rather than any conduct of defendant, solely caused his harm).

85. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 836 (1996).

cases, courts have split on the propriety of using either superseding cause or sole proximate cause against negligent plaintiffs.<sup>87</sup>

Perhaps the best-known recent jurisdictional split was ultimately resolved, at least for now, in federal maritime law by the 1996 *Exxon v. Sofec*<sup>88</sup> case from the United States Supreme Court. In that case, Justice Thomas, writing for a unanimous Court, announced that “we affirm that the requirement of legal or ‘proximate’ causation, and the related ‘superseding cause’ doctrine, apply in admiralty notwithstanding our adoption of the comparative fault principle.”<sup>89</sup> In that case, the tanker *Exxon Houston*, having broken away from a mooring manufactured by defendant Sofec, ran aground on a Hawaiian reef after the Houston’s captain made a series of maneuvers that the district court characterized as “extraordinary negligence.”<sup>90</sup> Exxon—the tanker’s owners—sued Sofec and the owner-operator of the mooring system, Hawaiian Independent Refinery, Inc., for the loss of the ship and its cargo on theories of negligence and breach of warranty.<sup>91</sup> Following a three-week bench trial, the district court “found that Captain Coyne’s (and by imputation, Exxon’s) extraordinary negligence was the superseding and sole proximate cause of the *Houston’s* grounding.”<sup>92</sup> Both the Ninth Circuit and the Supreme Court affirmed.

*Exxon v. Sofec* resolved a circuit split that had existed for just

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86. See, e.g., *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 11 (1st Cir. 1998) (contributory negligence a complete defense in Jones Act case where jury finds the plaintiff’s own negligence was the sole proximate cause of his injury); *Gavagan v. United States*, 955 F.2d 1016, 1022 (5th Cir. 1992) (plaintiff barred where his own actions “were the sole and proximate cause of his own injuries”).

87. Compare, e.g., *Strobel v. Chicago, Rock Island & Pac. Ry. Co.*, 96 N.W.2d 195, 201 (Minn. 1959) (plaintiff’s negligence can be regarded as intervening superseding cause in FELA case), with *Page v. St. Louis S.W. Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965) (sole proximate cause not properly applied in FELA’s pure comparative fault regime).

88. 517 U.S. 830 (1996).

89. *Id.* at 832.

90. *Id.* at 840.

91. See *id.* at 834.

92. *Id.* at 835.

over a decade. While several lower federal courts had held that a plaintiff's negligence could be a superseding or sole proximate cause,<sup>93</sup> the Eleventh Circuit plainly had held to the contrary.<sup>94</sup> In *Hercules, Inc. v. Stevens Shipping Co.*<sup>95</sup> the court explicitly held that the doctrine of intervening negligence had no place in the pure comparative scheme of admiralty law. Judge Kravitch, writing for a unanimous panel, said that "[u]nder a 'proportional fault' system, no justification exists for applying the doctrines of intervening negligence and last clear chance. . . . [C]omplete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases."<sup>96</sup> Labeling a plaintiff's negligence an intervening cause was, in the court's view, an improper attempt to "circumvent this 'proportional fault' concept."<sup>97</sup>

The *Hercules* court's criticism is not at all unique; a number of states have decided that intervening superseding cause should not be used to bar a plaintiff's recovery after the adoption of comparative negligence. A number of these courts have so opined after *Exxon v. Sofec*. To take a recent example, the Pennsylvania Supreme Court held in 1998 that superseding cause was not applicable to a single plaintiff-single defendant case.<sup>98</sup> In this case, plaintiff's husband was killed in a one-car accident when the family car he was driving crossed over the oncoming lane, slammed into a guardrail, and struck a concrete bridge abutment.<sup>99</sup> Plaintiff, who was a passenger in the

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93. See, e.g., *Lone Star Indus., Inc. v. Mays Towing Co.*, 927 F.2d 1453, 1458 (8th Cir. 1991) (holding that barge owner's negligence in failing to inspect boat before unloading, and having only one worker present during unloading was superseding cause of the barge's sinking); *Afran Transport Co. v. S/T Maria Venizelos*, 450 F. Supp. 621, 638-39 (E.D. Pa. 1978) (finding the plaintiff vessel's ungrounding efforts "were so negligent as to be a supervening cause" freeing defendants from all liability for the damages attributable to ungrounding).

94. See *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075 (11th Cir. 1985).

95. 765 F.2d 1069 (11th Cir. 1985).

96. *Id.* at 1075.

97. *Id.*

98. See *Von der Heide v. Pennsylvania Dep't of Transp.*, 718 A.2d 286, 289-90 (Pa. 1998).

99. See *id.* at 287.

car, sued the state transportation department, alleging defective conditions of the roadway and guardrails and improper guardrail maintenance.<sup>100</sup> The jury found the defendant 60% negligent and decedent 40% negligent, and awarded plaintiff damages of \$1.7 million.<sup>101</sup> The trial court then granted defendant's motion for a new trial on the ground that a jury instruction should have been given on decedent's superseding cause.<sup>102</sup> The appeals court reversed the new trial order and reinstated the jury verdict,<sup>103</sup> and the supreme court affirmed.<sup>104</sup> Quoting the *Restatement (Second) of Torts*, the court said, "[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."<sup>105</sup> Even if decedent's action was unforeseeable, which is required to turn an "intervening" cause into a "superseding" one, "the mere reasonable unforeseeability of [his] conduct does not render it a superseding cause without having first been the act of a third person."<sup>106</sup> Because the concept of intervening superseding cause properly applies only to the acts of "someone or something other than the plaintiff or the defendant," the trial court had in essence "confuse[d] the concepts of superseding cause and comparative negligence."<sup>107</sup> In a modified comparative state such as Pennsylvania, the court reasoned, the plaintiff's negligent act may bar recovery, but only if the jury determines that the injuries were due more to the plaintiff's negligence than to the defendant's. But "this identity of outcomes in no way makes comparative negligence, whatever the degree, the equivalent of superseding cause."<sup>108</sup>

A federal district court made the same point in a 1996 case applying Delaware law.<sup>109</sup> In that case, defendant sold and installed a

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100. *See id.* at 288.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.* at 290.

105. *Id.* at 288 (quoting RESTATEMENT (SECOND), *supra* note 34, § 440).

106. *Id.* (citing *Trude v. Martin*, 660 A.2d 626, 632 (Pa. Super. Ct. 1995)).

107. *Id.*

108. *Id.* at 289.

109. *See Hansen v. Umtech Industrieservice Und Spedition, GmbH*, Civ. A. No. 95-516 MMS, 1996 WL 622557 (D. Del. July 3, 1996).

waste treatment drying machine on which plaintiff was working when his pants leg became caught in an exposed drive chain and sprocket assembly. In trying to extricate his pants from the machine, plaintiff's hand became caught in it and he suffered the loss of three fingers and a broken arm.<sup>110</sup> Plaintiff sued on theories of negligence, strict liability, and breach of warranty, and defendant moved for summary judgment arguing, *inter alia*, that plaintiff's own negligence "is a superseding cause of his injuries."<sup>111</sup> Denying the motion, the court said that "[s]uperseding causes refer to new and independent acts, not to the plaintiff's own negligence."<sup>112</sup> The court, noting that defendant was in essence arguing that plaintiff was the sole cause of his injury, found such an argument at odds with Delaware's modified comparative fault scheme:

Stripped to its most basic element, [defendant] is asking this court to decide that the combination of [plaintiff's] acts and omissions amounts to more than 50% of the negligence which led to his injury. This determination cannot be made as a matter of law, and therefore must be made by a jury.<sup>113</sup>

Illinois similarly limits the application of sole proximate cause. As its high court said in 1997, a jury instruction on sole proximate cause is proper "only where there is evidence tending to show that the sole proximate cause of the occurrence was the conduct of a third person."<sup>114</sup> The court, holding that the trial court did not err in refusing a sole proximate cause instruction in a medical malpractice case in which the jury awarded the plaintiff \$8 million, said:

A defendant is not automatically entitled to a sole proximate cause instruction wherever there is evidence that . . . more than one person may have been negligent. Instead, a sole proximate cause instruction is not appropriate unless there is evidence that the *sole* proximate cause (not "a" proximate cause) of a plaintiff's injury is conduct of an-

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110. *See id.* at \*1.

111. *Id.* at \*8.

112. *Id.* at \*10 n.4 (citing *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995)).

113. *Id.* at \*10.

114. *Holton v. Memorial Hosp.*, 679 N.E.2d 1202, 1219 (Ill. 1997).

other person or condition.<sup>115</sup>

The Nebraska Supreme Court has simply concluded that juries should no longer be instructed on “efficient intervening causes” in negligence cases.<sup>116</sup> In *Sacco v. Carothers*, a bar patron who was injured in a fight with a fellow patron after the bartender told them to “take it outside” or she would call the police, sued the bar owner for his injuries. The supreme court reversed a defense verdict on the ground that a jury instruction on intervening superseding cause was prejudicial error.<sup>117</sup> Nebraska courts had earlier held, in accordance with the plain language of the Restatement, that superseding or intervening cause does not apply to the acts of the plaintiff or a defendant; as the court said, the rule in Nebraska is:

An efficient intervening cause is a new, independent force intervening between the defendant’s negligent act and the plaintiff’s injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff’s injury.<sup>118</sup>

The defendant in *Sacco* thus argued that it was the intervening act of the other bar patron, not the plaintiff, that superseded the bartender’s negligence. The court held as a matter of law that the other patron’s “physical activity . . . in engaging in a fight with Sacco was not an efficient intervening cause.”<sup>119</sup> The court went on, since it was remanding for a new trial, to determine that “the practice of instructing juries regarding ‘efficient intervening’ cause should henceforth be discontinued by the trial courts of this state.”<sup>120</sup> A proper instruction of proximate causation, the court reasoned, is sufficient to encompass notions of intervening cause without the “confusion that persists when the concept of efficient intervening cause, often referred to as superseding cause, is treated as separate from that of

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115. *Id.*

116. *See Sacco v. Carothers*, 567 N.W.2d 299, 305 (Neb. 1997).

117. *See id.*

118. *Id.* at 304 (citing *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 538 N.W.2d 732 (Neb. 1995), and *Merrick v. Thomas*, 522 N.W.2d 402 (Neb. 1994)).

119. *Id.* at 305.

120. *Id.*

proximate cause.”<sup>121</sup> In other words, the idea or concept of a new and independent cause freeing the defendant from liability is adequately reflected in a general proximate cause instruction, making a separate instruction on superseding cause simply a confusing distraction “from a more direct assessment of whether the defendant’s actions have proximately caused the plaintiff’s injury.”<sup>122</sup>

New Mexico’s Supreme Court came to the same conclusion, on basically the same grounds, in *Torres v. El Paso Electric Co.*,<sup>123</sup> decided in the summer of 1999. The plaintiff was helping to replace a greenhouse roof as part of his job duties when he came into contact with a high voltage conductor installed and maintained by defendant El Paso Electric.<sup>124</sup> At trial, defendant argued that the negligence of the plaintiff, plaintiff’s employer, and two other contractors superseded its own negligence and “therefore, constituted independent intervening causes which relieved [defendant] of liability.”<sup>125</sup> The trial court instructed the jury on independent intervening cause, which was an affirmative defense under New Mexico law, and the jury returned a special verdict finding that defendant was negligent but did not proximately cause plaintiff’s injuries.<sup>126</sup> The court of appeals certified the question of the propriety of such an instruction, and the supreme court held that it is always improper when used with reference to a plaintiff’s negligence, on the ground that it “unduly emphasize[s] a defendant’s attempt to shift fault to a plaintiff,” which thus “creates an unacceptable risk that the jury will inadvertently apply the common law rule of contributory negligence” that the court had abolished in 1981.<sup>127</sup> The court went on to say that because of the risk of confusion, and because the standard intervening cause instruction largely duplicates the basic proximate cause instruction, trial courts should no longer give separate intervening cause instructions or make explicit reference to independent intervening cause in the

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121. *Id.*

122. *Id.* at 306.

123. 987 P.2d 386 (N.M. 1999).

124. *See id.* at 389.

125. *Id.* at 390.

126. *See id.*

127. *Id.* at 393.

proximate cause instruction in any cases involving multiple acts of negligence.<sup>128</sup>

Iowa courts have cautioned that a plaintiff's negligence should rarely be characterized as an intervening cause after the advent of comparative negligence.<sup>129</sup> In *Sumpter*, the plaintiff suffered a heart attack while cleaning public ditches near his home and sued the city for its negligence in failing to keep the ditches open.<sup>130</sup> After a jury verdict against him, plaintiff appealed, claiming that the trial court erred in charging the jury that an intervening cause could free the defendant from liability. On appeal, the defendant argued that "the intervening event was Sumpter's own conduct of physically 'over-exerting' himself in cleaning the ditch . . . . It was this later conduct . . . which caused the heart attack and justified the intervening cause instruction."<sup>131</sup> The court rejected this doctrinal formulation on the facts of the case, citing a number of cases for the proposition that "[g]enerally, the doctrine of intervening cause embraces the intervention of the acts of a third-party or an outside force, not the actions of the injured plaintiff."<sup>132</sup> The court acknowledged that some jurisdictions have dissented from this general view, but pointed out that cases using intervening cause against plaintiffs often involve "wholly unforeseeable" conduct and acts by plaintiffs "that rise above mere negligence."<sup>133</sup> In this case, plaintiff's acts in clearing out the ditches were "done in direct response to the failure of the city to act. The city created the stimulus for Sumpter to act, and exposed him to a risk of harm."<sup>134</sup> Thus plaintiff's acts "could not constitute an intervening, superseding cause of his injury."<sup>135</sup> The court's disap-

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128. *See id.* at 395.

129. *See Sumpter v. City of Moulton*, 519 N.W.2d 427 (Iowa Ct. App. 1994).

130. *See id.* at 431.

131. *Id.* at 431-32.

132. *Id.* at 432 (citing *Schnebly v. Baker*, 217 N.W.2d 708, 729 (Iowa 1974); *see Beirne v. Security Heating-Clearwater Pools Inc.*, 759 F. Supp. 1120, 1123 (M.D. Pa. 1991); *Blessing v. Welding*, 286 N.W. 436, 439 (Iowa 1939); *Hickey v. Zezulka*, 487 N.W.2d 106, 118 (Mich. 1992); RESTATEMENT (SECOND), *supra* note 34, § 440.

133. *Sumpter*, 519 N.W.2d at 432.

134. *Id.*

135. *Id.*

proval of the defendant's argument went beyond the facts, however; the court said that the doctrine of superseding cause should be "strictly limited to cases involving acts that are independent of the alleged negligence of the defendant," because "[t]he principles of comparative fault could be seriously diluted by utilizing the conduct of a plaintiff as an intervening cause. The preferred approach is to judge the conduct of the plaintiff under comparative fault."<sup>136</sup>

A 1991 case from the Hawaii appeals court also spoke with disapproval of a defendant's assertion that the plaintiff's conduct was a superseding cause.<sup>137</sup> In the case, a patient sued his surgeon, alleging that the doctor had negligently failed to obtain his informed consent prior to the surgery on his finger and leg.<sup>138</sup> Following the operation, plaintiff suffered pain and discomfort in his foot and leg.<sup>139</sup> By special verdict, the jury found that the doctor's negligence was not "the legal cause" of plaintiff's harm, and on appeal the defendant argued that the superseding cause of plaintiff's injuries was either his negligently allowing his leg to become infected, or his going swimming in the ocean after the surgery, during which time a rock hit him in the leg.<sup>140</sup> The court found that neither of these acts could comprise a superseding cause, since the numbness and pain in plaintiff's leg occurred "prior to the occurrence of the infection and the swimming incident."<sup>141</sup> In a footnote, however, the court gave a more fundamental reason to find the superseding cause instruction erroneous: "By definition a superseding cause is 'an act of a third person or other force' which intervenes. . . . Where the plaintiff's act is the alleged superseding cause, it constitutes contributory negligence, which 'is negligence of the plaintiff before any damage, or any invasion of his rights, has occurred, which bars all recovery.'"<sup>142</sup>

A federal district court in 1988 interpreted Indiana law as abol-

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136. *Id.*

137. *See* Keomaka v. Zakaib, 811 P.2d 478, 478 (Haw. Ct. App. 1991).

138. *See id.* at 482.

139. *See id.* at 481.

140. *See id.* at 485.

141. *Id.*

142. *Id.* at 485 n.6 (quoting RESTATEMENT (SECOND), *supra* note 34, § 440, and PROSSER & KEETON, *supra* note 9, § 65, at 458).

ishing superseding intervening cause as an all-or-nothing doctrine following the adoption of modified comparative fault.<sup>143</sup> In the case, a long-distance trucker fell out of the bucket of a highloader that was being used to get him out of his truck, breaking both wrists and his back.<sup>144</sup> In his suit against the company that employed the workers who were operating the highloader, the jury found him 40% at fault and defendant 60% at fault.<sup>145</sup> Plaintiff appealed, claiming among other things that the trial court erred in not giving a superseding intervening cause instruction, on a theory that the defendant's employees' acts superseded any negligent act of his own.<sup>146</sup> Holding against him, the court said that after the Indiana legislature's adoption of modified comparative fault, the doctrine of superseding and intervening cause is "no longer available to completely excuse the negligence of the plaintiff."<sup>147</sup> The court reasoned that intervening superseding cause, as well as last clear chance and assumed risk, were simply "ameliorative common law doctrines designed to lessen the harsh results of contributory negligence" and thus have no role after the adoption of comparative fault.<sup>148</sup> Further, and even more fundamentally, the court noted, "the definitions of superseding and intervening cause necessarily suggest the intervention of a third party or independent agency which excuses the negligent acts of an antecedent tort-feasor."<sup>149</sup> Since the plaintiff failed to identify any "third party or independent agency" whose acts intervened, the doctrine had no possible application.<sup>150</sup>

Texas courts have disapproved of using sole proximate cause to describe anything other than third-party behavior.<sup>151</sup> For example, in *American Jet, Inc. v. Leyendecker*, an airplane owner sued a prospec-

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143. See *Roggow v. Mineral Processing Corp.*, 698 F. Supp. 1441 (S.D. Ind. 1988).

144. See *id.* at 1443.

145. See *id.*

146. See *id.* at 1444.

147. *Id.* at 1445.

148. *Id.*

149. *Id.* (citing BLACK'S LAW DICTIONARY 736, 1289 (5th ed. 1979)).

150. *Id.*

151. See *American Jet, Inc. v. Leyendecker*, 683 S.W.2d 126, 124 (Tex. Ct. App. 1984).

tive purchaser of the plane, who crashed it during a test-flight.<sup>152</sup> On appeal, the court found it was error for the trial court to have instructed the jury on sole proximate cause, saying “[s]ole proximate cause pertains to neither the conduct of the plaintiff nor that of defendant but to a third party, whose conduct would be solely causative of the occurrence at issue.”<sup>153</sup> Since there was no “third party” involved in the accident, any allusion to sole proximate cause was improper, although harmless error in the case.<sup>154</sup> *American Jet* has been cited as authority in subsequent Texas cases.<sup>155</sup>

District Judge Bertelsman of the Eastern District of Kentucky has opined in two cases that superseding intervening cause has no role in a single plaintiff–single defendant case.<sup>156</sup> He wrote in *Carlotta* that “[s]uperseding cause involves the negligence of a third party or the intervention of some natural force. The defense of superseding or intervening cause as such is not properly applied to the plaintiff’s negligence.”<sup>157</sup> Yet, he found that under Kentucky law, sole proximate cause still had a role to play even after the adoption of pure comparative fault.<sup>158</sup> Judge Bertelsman’s analysis in the *Tennyson* case was quite similar. There, the driver of a car fell asleep at the wheel with the cruise control engaged and crashed into a tractor-trailer rig that was parked on the shoulder of the inter-

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152. *See id.* at 124.

153. *Id.* at 126 (citing *Herrera v. Balmorhea Feeders, Inc.*, 539 S.W.2d 84, 86-87 (Tex. 1976)).

154. *See id.*

155. *See Ponder v. Morrison-Knudsen Co.*, 685 F. Supp. 1359, 1368 (E.D. Tex. 1988) (refusing to apply sole proximate cause to plaintiff’s conduct, relying on *American Jet*); *see also Carter v. Helicopter Ambulance Serv. of N. Texas, Inc.*, No. 05-95-00468-CV, 1996 WL 403987, at \*5 (Tex. Ct. App. July 19, 1996) (unpublished memorandum) (quoting the case with approval, but without applying its rule); *Petty v. Children’s World Learning Centers, Inc.*, No. 05-94-00998-CV, 1995 WL 379522, at \*4 (Tex. Ct. App. May 31, 1995) (unpublished memorandum) (quoting the case with approval, but without applying its rule).

156. *See Tennyson v. Brower*, 823 F. Supp. 421 (E.D. Ky. 1993) (applying Kentucky law); *Carlotta v. Warner*, 601 F. Supp. 749 (E.D. Ky. 1985) (applying Kentucky law).

157. *Carlotta*, 601 F. Supp. at 754.

158. *See id.* (citing *Lee v. Dutli*, 403 S.W.2d 703 (Ky. 1966), and *Lawhorn v. Holloway*, 346 S.W.2d 302 (Ky. 1961)).

state.<sup>159</sup> The passengers in the car sued the driver of the parked truck, and after a jury verdict in defendant's favor, moved for judgment as a matter of law and for a new trial.<sup>160</sup> The plaintiffs argued that because the defendant was negligent per se in parking on the shoulder, his negligence had to have been a substantial factor in causing plaintiffs' injuries.<sup>161</sup> Denying both motions, the court said that plaintiffs' arguments "confuse the doctrine of superseding cause with general causation principles," and that superseding cause was "irrelevant," since plaintiffs admitted they were all in the same legal posture as the driver for analytical purposes.<sup>162</sup> Instead, "[t]he jury could well have found that the plaintiff driver's negligence was the sole cause of the accident in the popular sense," or that "the plaintiff driver's own negligence was so overwhelming as to negate the truck driver's negligence."<sup>163</sup>

A Massachusetts court disapproved of using a plaintiff's negligence as an intervening cause or sole proximate cause in a 1983 conversion case.<sup>164</sup> Plaintiff was a depositor who sued a safe deposit company for negligently supervising its employees, whom he charged with stealing over one hundred gold Krugerrands from his safe deposit box.<sup>165</sup> Defendant argued that plaintiff's negligence in giving an employee the key to his safe deposit box "was the sole proximate cause of the theft."<sup>166</sup> Reversing a directed verdict for defendant, the appeals court concluded that it could not say as a matter of law "that the plaintiff's conduct was the sole cause of his loss."<sup>167</sup> Instead, the court explained, the degree of each party's fault had to be determined by the jury, and in a footnote added, "the plaintiff's negligence should not be viewed as an 'intervening, or insulating cause between the defendant's negligence and the result.' Rather,

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159. See *Tennyson*, 823 F. Supp. at 422.

160. See *id.* at 422-23.

161. See *id.* at 422.

162. *Id.* at 423.

163. *Id.* at 424 (emphasis omitted).

164. See *O'Malley v. Putnam Safe Deposit Vaults, Inc.*, 458 N.E.2d 752 (Mass. App. Ct. 1983).

165. See *id.* at 755, 757.

166. *Id.* at 760.

167. *Id.* at 760 (citation omitted).

the negligence of the plaintiff and that of the defendant are each one of the causes without which the injury would not have occurred.”<sup>168</sup>

Missouri, a pure state, has clearly held a plaintiff’s conduct can be a superseding cause.<sup>169</sup> But in dictum in a 1980 appellate opinion, the court came to the contrary view. In *Chambers v. Bunker*,<sup>170</sup> the plaintiff’s and defendant’s cars collided at an intersection and traveled up an embankment due to defendant’s failure to yield.<sup>171</sup> After a moment of calm, the intertwined cars rolled backwards down the embankment and struck a parked car. The plaintiff sued for personal injuries as well as damage to her car. After a jury verdict for plaintiff, defendant appealed, claiming that the court should have instructed the jury on intervening efficient cause on a theory that the second collision—with the parked car—was an intervening cause exonerating defendant from all damages. In rejecting this argument, the court said, “the omissions and acts of either party to a damage suit for personal injuries suffered by plaintiff cannot be a new and independent cause. Such new and independent cause must be ascribed to a third person or some outside agency operating to cause the injury.”<sup>172</sup> Here, the court said, “[t]he only causes involved were those produced by plaintiff and defendant. Therefore, no intervening efficient cause was present to interrupt the chain of events set in force by defendant’s negligence.”<sup>173</sup>

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168. *Id.* at 760 n.10 (quoting WILLIAM L. PROSSER, PROSSER ON TORTS 417 (4th ed. 1971)).

169. *See, e.g.*, *Williams v. Birkeness*, 34 F.3d 695, 697 (8th Cir. 1994) (applying Missouri law); *Eidson v. Reproductive Health Servs.*, 863 S.W.2d 621, 626-28 (Mo. Ct. App. 1993); *Vann v. Town Topic, Inc.*, 780 S.W.2d 659, 661-62 (Mo. Ct. App. 1989).

170. 598 S.W.2d 204 (Mo. Ct. App. 1980).

171. *See id.* at 205.

172. *Id.* at 207.

173. *Id.* at 208.

## IV. A FUNCTIONAL EVALUATION

A. *The Ameliorative Function*

## 1. The major criticism: undercutting pure comparative systems

The most pointed criticism of the use of superseding or sole proximate cause, from courts and commentators alike, is that it undercuts the very idea of pure comparative responsibility, which contemplates that the negligent conduct of the plaintiff and defendant are to be compared no matter what their respective amounts or degrees of negligence. David Robertson, a frequent critic, has written that sole proximate cause is often “pernicious” in this context:

Allowing a defendant whose negligent conduct has been shown to be a proximate cause of the harm to escape liability by pointing to the victim’s fault as “sole proximate cause” would amount to smuggling the abolished contributory negligence defense into these cases through the back door. This “sole proximate cause” fallacy has been widely debunked in the general comparative fault literature.<sup>174</sup>

His criticisms of using superseding cause analysis against plaintiffs have been to the same point, and equally unyielding.<sup>175</sup> A Missouri scholar-practitioner has opined:

Intervening cause should not be allowed to undermine the allocation of fault system by injecting contributory negli-

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174. David W. Robertson, *The Texas Employer’s Liability in Tort for Injuries to an Employee Occurring in the Course of the Employment*, 24 ST. MARY’S L.J. 1195, 1200 (1993); see also David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 LA. L. REV. 1, 29-32 (1997) [hereinafter Robertson, *Causation Confusion*] (arguing that holding a plaintiff’s negligence as sole proximate cause or intervening superseding cause reintroduces contributory negligence or implied assumption of risk into the law, and makes the plaintiff prove something on which the defendant should have the burden of proof).

175. See David W. Robertson, *Love and Fury: Recent Radical Revisions to the Law of Comparative Fault*, 59 LA. L. REV. 175, 196 (1998) [hereinafter Robertson, *Love and Fury*] (criticizing *Exxon v. Sofec*’s use of superseding cause analysis as an “infamous instance” of the reintroduction of the contributory negligence bar “into what was supposedly a pure comparative fault system”).

gence under another name. One way to assure that the doctrine of superseding cause does not become another name for contributory negligence . . . is for the Supreme Court of Missouri to follow the rule [that] acts of neither party can be a superseding cause.<sup>176</sup>

Similarly, an Illinois scholar-practitioner concludes that “[a] defendant’s assertion that a plaintiff’s conduct was the sole proximate cause of injury has the effect of circumventing and barring comparative negligence rules. . . . In effect, sole proximate cause defeats the purpose of a comparative negligence system and simply replaces contributory negligence with a pseudonym.”<sup>177</sup> A student author, writing about a 1985 Wyoming Supreme Court case that used such an analysis, concluded that “[s]uch a harsh result is unnecessary when the rules of comparative negligence are employed.”<sup>178</sup> Another recent student-authored note argues that superseding cause analysis “effectively undermines the American system of pure comparative fault.”<sup>179</sup> Yet another recent piece asserts flatly that superseding cause analysis is “logically inconsistent” with pure comparative fault.<sup>180</sup> At bottom, this author asserts, “the term ‘superseding cause’ should be dropped entirely in comparative fault contexts, including maritime law.”<sup>181</sup>

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176. Timothy H. Bosler, *Comparative Fault and the Personal Injury Defenses of Mitigation and Intervening Cause*, 52 J. MO. B. 216, 219 (1996) (citations omitted).

177. John G. Phillips, *The Sole Proximate Cause “Defense”: A Misfit in the World of Contribution and Comparative Negligence*, 22 S. ILL. U. L.J. 1, 15 (1997).

178. Jay T. Hopkins, Note, *Should a Plaintiff’s Intervening Act Be an Absolute Defense Under Comparative Negligence?*, 21 LAND & WATER L. REV. 591, 602 (1986).

179. Kelsey L. Joyce Hooke, Comment, *Collision at Sea: The Irreconcilability of the Superseding Cause and Pure Comparative Fault Doctrines in Admiralty*, 74 WASH. L. REV. 159, 187 (1999).

180. Terry Christlieb, Note, *Why Superseding Cause Analysis Should Be Abandoned*, 72 TEX. L. REV. 161, 181 (1993). Christlieb’s points were relied upon heavily in *Torres v. El Paso Elec. Co.*, 987 P.2d 386 (N.M. 1999), in which the New Mexico Supreme Court disapproved the use of intervening superseding cause analysis against plaintiffs as well as in multiple-party cases. See *infra* notes 114-19.

181. Christlieb, *supra* note 180, at 181.

It may be true that barring a negligent plaintiff entirely on any number of doctrinal grounds seems logically inconsistent with a truly pure comparative system. But what most of these criticisms fail to recognize is that logical inconsistency does not necessarily undercut a legal construct that must be more than “logical” in order to survive in the real world of law. At times, and this is but one such instance, a theoretically pure and even simple system must have some messy and inconsistent safety valves to prevent it from becoming obsessively pure and simple. Thus, as more fully argued below, some “rough edges” tend to preserve, not undercut, otherwise theoretically seamless legal systems such as pure comparative responsibility.

## 2. The role of legal fictions

Any attempt to analyze the ameliorative functions served by applying superseding cause to plaintiffs’ conduct should begin by acknowledging that the doctrine, like the great trunk of proximate cause on which it is but a branch, has little if anything to do with “causation.” As Prosser & Keeton’s hornbook aptly puts it, “the problem is not primarily one of causation at all, since it does not arise until cause in fact is established. It is rather one of the policy as to imposing legal liability.”<sup>182</sup> Ultimately, the doctrine is addressed to “problems of responsibility, and not physics. . . . The question is always one of whether the defendant is to be relieved of responsibility, and the defendant’s liability superseded, by the subsequent event.”<sup>183</sup> Thus one would expect the doctrine, when invoked, to serve policy ends—the goals of “practical politics,” in Judge Andrews’s words—and not necessarily either logic or physics. A look below the surface indicates that this is indeed the case.

At the outset, it must also be recognized that this area of law is replete with legal fictions, situations in which courts consciously use one term or set of terms when they actually rest their opinion on some other principle.<sup>184</sup> There is, of course, a heavy dose of legal

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182. PROSSER & KEETON, *supra* note 9, § 44, at 301.

183. *Id.* at 302.

184. See LON L. FULLER, LEGAL FICTIONS 7, 10 (1967) (defining a legal fiction as an “expedient, but *consciously false*, assumption,” a statement which “is frequently a metaphorical way of expressing a truth”).

fiction in the term “proximate cause” itself, thus also in the terms “sole proximate cause” and “superseding cause,” because, as noted above, these legal terms do not truly involve causation at all.<sup>185</sup> The question of whether a superseding cause exists is just a disguised way of making a normative judgment about whether a particular defendant bears legal responsibility for the plaintiff’s injury. “Again the issue is merely one of the policy which imposes liability,” as Prosser said, “and any attempt to deal with it in the language of . . . causation can lead only to perplexity and bewilderment.”<sup>186</sup>

### 3. Revival of the slight/gross or major/minor fault doctrine

Superseding cause and sole proximate cause may be seen, particularly in those states whose legislatures have adopted pure comparative schemes, as a way for the judiciary to accomplish a slight modification of that scheme—to develop, as it were, a judicially-constructed amelioration to soften a pure scheme’s harsh effects on defendants.<sup>187</sup> In this situation, invocation of the doctrines of superseding or sole proximate cause may be seen as a kind of legal fiction a judge sometimes uses “for the purpose of concealing from himself or others the fact that he is legislating . . . .”<sup>188</sup> This should not be surprising to anyone aware of the history of the ameliorating doctrines that sprung up in response to the *Butterfield* all-or-nothing scheme that barred the slightly negligent plaintiff from all recovery. Just as judges stepped in to create exceptions and special rules to get around unjust results in particular kinds of cases, to avoid making the slightly faulty plaintiff bear an entire loss, judges may now be stepping in to create (or more properly, revive) some special rules to avoid making the slightly faulty defendant pay the overwhelmingly

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185. See *id.* at 51 (“[T]he purpose of any fiction is to reconcile a specific legal result with some premise or postulate.”).

186. William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 398 (1950) [hereinafter *Proximate Cause*].

187. Cf. PROSSER & KEETON, *supra* note 9, at 457 n.56 (“A creative use of the sole proximate cause doctrine may be the most effective means of remedying the quandary of the slightly negligent plaintiff.”). What some courts have done, in fact, is turn this conception on its head to deal with the “slightly negligent defendant.”

188. FULLER, *supra* note 184, at 63-64.

faulty plaintiff a very large sum of money.

In essence, the phenomenon at work here is the subtle judicial adoption, in the guise of superseding or sole proximate cause, of a kind of "major/minor" fault doctrine of the sort once used in admiralty collision cases, or a kind of modified "slight/gross" fault scheme that has been used in a small number of states since the mid-nineteenth century. Again, when used in a state whose legislature has adopted pure comparative responsibility, this is a judicial modification of a statutory scheme; when used in one of the states whose high court has adopted such a scheme, it merely represents some judicial "fine-tuning."

As explained by the Supreme Court, admiralty's major/minor fault rule was used "to find a grossly negligent party solely at fault," and served as an ameliorating doctrine in an allocation scheme under which damages were equally divided among all responsible parties, regardless of their degrees of fault or causation.<sup>189</sup> That is, under a system in which a defendant who was one of two responsible actors in causing a collision at sea would be made to pay one-half of the damages regardless of his degree of fault, there arose this major/minor fault rule that freed that defendant from paying anything if his fault was slight, shifting complete responsibility onto the party whose fault was comparatively great.<sup>190</sup> This rule purportedly died along with the divided damages rule, replaced by a pure comparative system.<sup>191</sup>

The history of the land-based slight/gross scheme is somewhat more obscure. In the mid-nineteenth century, a handful of states, led by Illinois,<sup>192</sup> experimented with a system under which the negligent plaintiff would normally be barred from recovery (in accordance

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189. See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 406 (1975) (citing *City of New York*, 147 U.S. 72, 85 (1893)).

190. See, e.g., *Villain & Fassio E Compagnia v. Tank Steamer E.W. Sinclair*, 207 F. Supp. 700, 712 (S.D.N.Y. 1962), *aff'd*, 313 F.2d 722 (2d Cir. 1963) (holding that the "gross faults" of one ship "so flagrantly and heavily outweigh any passive fault" of the other that the "interests of justice are best served by condemning the more culpable vessel completely").

191. See *Reliable Transfer*, 421 U.S. at 410-11. For a brief history and analysis of this rule and its demise, see Hooke, *supra* note 179, at 161-68.

192. See *Galena & Chicago Union R.R. Co. v. Jacobs*, 20 Ill. 478, 497 (1858).

with the basic rule of *Butterfield*), but not if the plaintiff's negligence was "slight" and the defendant's "gross," in which case the plaintiff could recover 100% of his damages.<sup>193</sup> This scheme proved impracticable (for one thing, the definition of "slight" was sufficiently uncertain as to produce too many appeals), and was ultimately superseded by ameliorating doctrines like last clear chance.<sup>194</sup> An improved variant of the slight/gross system was adopted, however, in South Dakota and Nebraska in the first half of the twentieth century, pursuant to which a slightly negligent plaintiff could recover damages against a grossly negligent defendant but would have his damages reduced by the percentage of negligence attributed to him.<sup>195</sup> South Dakota currently follows a scheme under which a plaintiff's negligence "shall not bar a recovery when . . . slight in comparison with the negligence of the defendant . . . ."<sup>196</sup> In essence, what some courts are doing in invoking superseding or sole proximate cause to bar negligent plaintiffs in pure comparative states is the essential opposite of this slight/gross scheme: A plaintiff's recovery may be barred where the plaintiff's negligence is "gross" in comparison with the "slight" negligence of the defendant. In a rare example of judicial non-fiction, Judge Bertelsman said this fairly explicitly in the *Carlotta* case:

The salutary adoption of the comparative negligence doctrine by the Supreme Court of Kentucky resolved many problems in negligence law, but not all. One of those remaining is presented here, that of the slightly negligent defendant versus the profoundly negligent plaintiff. The doctrine of comparative negligence does not mean that plaintiff is entitled to a recovery in some amount in every situation in which he can show some negligence of the defendant, however slight. . . . Where, as here, the defendant's negli-

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193. See SCHWARTZ, *supra* note 6, § 3-4, at 70. The other states were Oregon, Wisconsin, and Tennessee. See *id.* (citing William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 485 (1953)). Tennessee's "remote contributory negligence" doctrine is well summarized in Mutter, *supra* note 24, at 214-27.

194. See SCHWARTZ, *supra* note 6, § 3-4(a), at 70.

195. See *id.* at 72.

196. S.D. CODIFIED LAWS § 20-9-2 (Michie 1995).

gence is very slight in relation to the negligence of the plaintiff . . . the law of causation becomes of paramount importance.<sup>197</sup>

Judge Bertelsman held that the defendant was entitled to summary judgment because the plaintiff's negligence in diving through an inertube and breaking his neck was the sole proximate cause of his harm, freeing the defendant pool owner from all damages.<sup>198</sup> He stressed that the plaintiff's damages in the case "could easily be in the millions," and thus "[a]n apportionment against the defendant in even a small percentage could result in a liability of hundreds of thousands of dollars when the only fault of the defendant was in failing to prevent the plaintiff's deliberately creating an obvious risk and purposefully subjecting himself to it."<sup>199</sup>

Cases that say that a plaintiff's conduct must be particularly blameworthy in order to constitute a superseding or sole proximate cause are fully consonant with this functional revival of the major/minor or slight/gross rule as well. To take a recent example, in *Miller v. Town of Fenton*, plaintiff's car was struck by defendant's train at a rural crossing that had no signal lights or gates.<sup>200</sup> The trial court granted summary judgment for defendant on the ground that "plaintiff's conduct was the sole or superseding cause of the accident . . . ."<sup>201</sup> The appeals court reversed, concluding that "we cannot say, as a matter of law, that plaintiff's actions were *so culpable* that they must be deemed a superseding cause of the accident."<sup>202</sup> The court added that the plaintiff's act of approaching the crossing in a manner that she could not stop in time was not a "deliberately reckless act" so "as to compel the conclusion that it is the only legal cause of an ensuing collision."<sup>203</sup> A dissenting judge said he agreed with the trial judge, that "plaintiff's conduct must be viewed as sufficiently reckless to interrupt the causal connection between the negligence as-

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197. *Carlotta v. Warner*, 601 F. Supp. 749, 751-52 (E.D. Ky. 1985).

198. *See id.* at 755.

199. *Id.* at 752.

200. *See* 669 N.Y.S.2d 391, 391-92 (1998).

201. *Id.* at 393.

202. *Id.* (emphasis added).

203. *Id.*

cribed to defendant and her injuries.”<sup>204</sup> A number of New York courts have applied a similar formulation, saying that summary judgment is proper on grounds of plaintiff’s superseding cause when the plaintiff’s conduct is “reckless.”<sup>205</sup> These cases purportedly turn on the “unforeseeability” of the plaintiff’s acts, stating that when an act is “reckless,” it becomes, in law, “unforeseeable.” This is yet another legal fiction, labeling an act unforeseeable when the operative ground for decision is that the plaintiff’s act is far more culpable than that of defendant.<sup>206</sup>

The maritime case of *Exxon v. Sofec* is another good example of this major/minor or slight/gross phenomenon, especially when one focuses on the facts recited in the Ninth Circuit opinion.<sup>207</sup> The trial judge in the case found the plaintiff’s ship’s captain “extraordinarily negligent” in failing to plot the ship’s position, failing to anchor, failing to ask for help from the Coast Guard or other ships, failing to back the vessel far enough from the shore, and deciding to linger un-

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204. *Id.* at 395 (Carpinello, J., dissenting).

205. *See, e.g.*, *Caraballo v. United States*, 830 F.2d 19 (2d Cir. 1987) (finding plaintiff’s reckless dive into shallow water a superseding cause under New York law); *Olsen v. Town of Richfield*, 616 N.E.2d 498 (N.Y. 1993) (sole proximate cause of swimmer’s injury was his reckless dive off bridge into shallow creek); *Howard v. Poseidon Pools, Inc.*, 530 N.E.2d 1280 (N.Y. 1988) (affirming summary judgments against plaintiffs who dove into shallow pools); *Boltax v. Joy Day Camp*, 490 N.E.2d 527 (N.Y. 1986) (affirming summary judgment where plaintiff dove into shallow water); *Lionarons v. General Electric Co.*, 626 N.Y.S.2d 321 (App. Div. 1995) (affirming summary judgment where plaintiff dove into shallow water); *Shutak v. Handler*, 599 N.Y.S.2d 24 (App. Div. 1993) (denying summary judgment where tenant fell off chair trying to repair ceiling); *Walter v. Niagara Mohawk Power Corp.*, 598 N.Y.S.2d 416 (App. Div. 1993) (denying summary judgment where plaintiff dove into shallow water).

206. David Robertson has been quite critical of this kind of approach: “If the only thing that makes the victim’s injury unforeseeable was the egregiousness of the victim’s fault, the core command of the pure percentage fault system is that the victim takes a very high percentage assignment but is not barred.” Robertson, *Love and Fury*, *supra* note 175, at 190 n.36; *cf.* H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 282 (2d ed. 1985) (“[C]ourts often adhere to the causal doctrine that a voluntary intervention, even if foreseeable, may exclude defendant’s liability, but do this in a disguised form by calling such events ‘unforeseeable’. So voluntary interventions come to be called ‘unforeseeable’, whether they are really improbable or not.”).

207. 54 F.3d 570 (9th Cir. 1995), *aff’d*, 517 U.S. 830 (1996).

necessarily too near the shore, all of which conduct constituted “the sole proximate, and thus the superseding, cause of the ship’s loss.”<sup>208</sup> The Ninth Circuit said these findings were well supported in the record in affirming, saying, “the district court did not err in finding Captain Coyne’s extraordinary negligence to be the sole proximate and superseding cause of the damage to the [ship].”<sup>209</sup> Indeed, the trial court even labeled the captain’s negligence “gross” at one point.<sup>210</sup> The defendants were allegedly negligent only in connection with the failing of a single point mooring system that allowed the ship to break away in the first place.<sup>211</sup> The Captain’s negligence was far more extensive; as the court of appeals said:

Captain Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and . . . his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout.<sup>212</sup>

The Supreme Court’s approval of the use of superseding cause to bar a negligent plaintiff has been roundly criticized as a revival of the major/minor fault rule that had been repudiated in *Reliable Transfer*.<sup>213</sup> But far from demonstrating that the *Sofec* Court’s application of superseding cause was bizarre or ill-advised, however, this unanimous functional “revival” of the major/minor fault rule in this particular guise evidences the compelling need for ameliorating doctrines in pure systems to avoid awarding damages to plaintiffs whose fault is extraordinary (or “gross” or “major”) compared to a defendant’s whose negligence is “slight” or “minor.” In short, even in the “pure” system of admiralty, courts are wisely reluctant to allow any apportionment of damages against a defendant whose negligence is truly minor compared to that of the plaintiff. And a handy, hardy, and flexible doctrine with which to accomplish that result is super-

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208. *Id.* at 577-78.

209. *Id.* at 579.

210. *Id.* at 576.

211. *See id.* at 572.

212. *Id.* at 579.

213. *See Hooke, supra* note 179, at 177.

seding or sole proximate cause.

### B. *The Proxy Function*

At times, the doctrines of superseding and sole proximate cause merely serve as proxies for other doctrines. Commentators have been especially critical of the use of these doctrines as proxies for affirmative defenses. One writer has argued that superseding cause is functionally identical to other absolute defenses, such as contributory negligence, last clear chance, assumption of risk, and known and obvious danger, and is inconsistent with the law when those defenses have themselves been abrogated.<sup>214</sup> Another argues forcefully that when matters that should be considered part of an affirmative defense are recast as part of the plaintiff's prima facie case, this improperly shifts to the plaintiff something on which the defendant rightfully bears the burden of proof, and may represent a "back-door" way to force the plaintiff to disprove his own contributory negligence.<sup>215</sup> However, the use of these doctrines as proxies for abrogated affirmative defenses does not appear nearly as common as their use as additional grounds of decision where *valid* defenses also bar the claim. For example, in a state that continues to view implied assumption of risk as a complete defense,<sup>216</sup> it would not be inconsistent for a court to conclude that plaintiff is barred either because he knowingly encountered a risk, or because his negligence intervened between his injury and the antecedent negligence of the defendant, thus becoming the "sole proximate cause." For example, in *McGowan*, a federal district court applying Mississippi law was faced with a case in which a truck driver was injured when he slipped on grease on a loading ramp and sued the landowner.<sup>217</sup> After a bench trial, the court found for defendant on a host of alternative grounds. First, the court said, the hazard was open and obvious

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214. See Hopkins, *supra* note 178, at 602.

215. See Robertson, *Causation Confusion*, *supra* note 174, at 29.

216. Most states no longer do so, after the adoption of comparative responsibility. See RESTATEMENT (THIRD): APPORTIONMENT, *supra* note 17, § 2, Reporter's Note, at 29.

217. See *McGowan v. St. Regis Paper Co.*, 419 F. Supp. 742 (S.D. Miss. 1976).

to the plaintiff, freeing defendant from any duty to warn him.<sup>218</sup> Second, there was no proof that defendant knew of the hazard or failed to correct it; thus, there was no evidence of any negligence by defendant.<sup>219</sup> The court further noted that under Mississippi law, plaintiff was “precluded from recovery . . . by the doctrine of assumption of risk,” since “his negligence was the sole proximate cause of the injury.”<sup>220</sup> Mississippi law is identical on the “defense” of a plaintiff’s unforeseeable misuse of a product.<sup>221</sup>

The proxy function occurs much more commonly with elements of the prima facie case. Generally, this function of the doctrines is harmless, although admittedly, redundancy may augment existing doctrinal confusion. As one early scholar put it:

[I]t is difficult to make progress in developing the principles of legal cause if the conception of it overlaps the other elements in a case more than necessary. So many cases say that the defendant was not the proximate cause when some other bar to liability is much more easily and

satisfactorily applicable that this caution can be emphasized scarcely enough.<sup>222</sup>

Another asserts that certain uses of the superseding cause doctrine merely add a “bevy of confusing terminology” to general conceptions of proximate cause.<sup>223</sup>

These criticisms aside, it can hardly be considered controversial to bar a plaintiff, negligent or not, based on a failure of the prima fa-

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218. *See id.* at 745.

219. *See id.*

220. *Id.* (quoting *Braswell v. Economy Supply Co.*, 281 So. 2d 669, 677 (Miss. 1973)).

221. *See, e.g.*, *Miller v. E.I. DuPont de Nemours & Co.*, 880 F. Supp. 474 (S.D. Miss. 1994) (under Mississippi law, misuse is a form of contributory negligence that may bar plaintiff’s recovery if it was the “sole proximate cause” of plaintiff’s injury or loss).

222. *James Angell McLaughlin, Proximate Cause*, 39 HARV. L. REV. 149, 153 (1925).

223. *Hooke, supra* note 179, at 188.

cie case. A plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant owed plaintiff a duty, breached that duty, and by that breach (negligent conduct) actually and proximately caused legally cognizable harm. A change from contributory negligence as a complete bar to a comparative scheme was never designed to shift that basic burden of proof. A plaintiff who fails to prove any one of these elements by a preponderance of the evidence cannot and should not recover; conversely, a defendant against whom any one of these elements is not proved should not be made to pay.

Obviously, perhaps, the most frequent proxy use of superseding or sole proximate cause is to explain with some greater particularity why the plaintiff has failed to prove that the defendant was not a proximate cause of the plaintiff's harm.<sup>224</sup> As one recent court put it in an auto accident case, the defendant's argument that plaintiff's negligence was "the *sole* proximate cause" of the crash "is but an inverted way of asserting that as a matter of law [defendant's] negligence, if any, was *not* a proximate cause of the accident and, therefore, that [plaintiff] cannot prove the causation element of her case in chief."<sup>225</sup> The element of proximate cause itself has some "substantial factor" limit built in; that is, negligent conduct that was an actual cause of harm will not be seen as a proximate cause at all where it was something less than a substantial factor in causing that harm.<sup>226</sup> In a state that has adopted the Restatement formulation, or something like it, the jury (or the judge, if reasonable jurors could not disagree) makes a judgment about substantiality of causation on an all-or-nothing basis at the outset, as part of judging the plaintiff's prima facie case (and the defendant's prima facie case of contributory negligence) and before any comparison is undertaken. Thus, when a

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224. Cf. Christlieb, *supra* note 180, at 183 (arguing that many cases in which superseding cause term is used would have been more clearly analyzed by simply using the term proximate cause).

225. *Smith v. Fourre*, 858 P.2d 276, 279 (Wash. Ct. App. 1993) (holding that the argument fails, since there were sufficient inferences that defendant was negligent).

226. See, e.g., RESTATEMENT (SECOND), *supra* note 34, § 431 (providing that conduct is "legal cause of harm to another" if it is "a substantial factor in bringing about the harm").

judge or jury decides that a plaintiff's own conduct is a superseding or sole proximate cause and bars the claim on that ground, such usage is entirely consistent with the inherent flexibility of proximate cause itself, and not at all inconsistent with any particular allocation scheme that applies only after liability itself is established. Theoretically, at least, "adoption of comparative negligence should have no effect on the rules of proximate causation obtaining in the particular jurisdiction."<sup>227</sup>

Some might complain that barring a plaintiff's recovery on the ground that his negligence was a far more significant *cause* of his own harm than was defendant's negligence is inconsistent with pure comparison. In most pure states, this is clearly not so, because what is purportedly being compared is "fault," or "negligence," not "causation."<sup>228</sup> In those states, there is no arguable inconsistency in holding a defendant not liable on the ground that his causal contribution was so insignificant (compared to that of the plaintiff) that the plaintiff's *prima facie* case fails for want of proof. In a few pure states, however, the legislature itself has approved of a kind of comparative causation at the damages allocation stage; for example, Michigan's statute provides: "In determining the percentages of fault . . . , the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed."<sup>229</sup> The problem here is indeed more pronounced. Judges who utilize superseding or sole proximate cause to determine a defendant's non-liability under a statute like Michigan's<sup>230</sup>—that is, to bar a plaintiff from ever reaching the allocation-

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227. SPEISER ET AL., *supra* note 18, § 13:22, at 752.

228. *See, e.g.*, N.Y. C.P.L.R. § 1411 (McKinney 1997) (calling for plaintiff's damages to be reduced "in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages").

229. MICH. COMP. LAWS ANN. § 600.6304(2) (West 1999).

230. In addition to Michigan, three other pure states have a statutory allocation scheme that explicitly takes causation into account. Alaska's statute provides that "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed." ALASKA STAT. §§ 09.17.080(b) (Michie 1998). Kentucky's statute provides: "In determining the percentages of fault, the trier of fact shall consider both the na-

of-damages phase on the ground that the “causal relation” between the defendant’s conduct and the plaintiff’s harm is so attenuated that the defendant is not liable at all—must do so with some care to avoid being directly at odds with the statutory scheme. This is so because the statute itself appears to dictate that the comparison of percentages should be done even where one party is overwhelmingly—even 99%—the *cause* of the harm. Mandating a comparison of causal contribution after liability is found, however, can hardly be seen as repealing the basic rules of proximate cause which, as noted above, have long provided a doctrinally sound way to free a remotely negligent party from legal responsibility.

Two simple New York cases illustrate this kind of usage. In *Bank v. Lincoln Shore Owners, Inc.*, the eighty-three-year-old plaintiff lived in an apartment building in which one elevator was not working.<sup>231</sup> She walked up one flight of stairs to the roof in order to get to a working elevator in another part of the building and while walking down the stairs from the roof, slipped and fell.<sup>232</sup> She sued Otis Elevator “on the theory that its failure to maintain the elevator”

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ture of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.” KY. REV. STAT. ANN. § 411.182(2) (Michie 1992). Washington’s statute provides:

Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

WASH. REV. CODE § 4.22.015 (West 1988); *see also* UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 135 (1977), *reprinted in* SCHWARTZ, *supra* note 6, § 22-4, at 459 (“In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.”). Louisiana courts have said that both fault and causation are to be considered in arriving at percentages of responsibility in its pure system. *See, e.g.,* Page v. Gilbert, 598 So. 2d 1110 (La. Ct. App. 1992); Jaffarzad v. Jones Truck Lines, Inc., 561 So. 2d 144 (La. Ct. App. 1990). New Mexico has suggested something similar. *See* Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579, 585 (N.M. Ct. App. 1982) (“We are unwilling . . . to say that although fault may be apportioned, causation cannot. If the jury can do one, it can do the other.”).

231. *See* 644 N.Y.S.2d 554, 555 (N.Y. App. Div. 1996).

232. *See id.* at 554-55.

was a proximate cause of her harm.<sup>233</sup> Ordering the complaint dismissed, the appellate division commented simply, “as a matter of law, Otis Elevator’s failure to have the elevator in operation was not a proximate cause of Mrs. Bank’s injuries.”<sup>234</sup> Can this result be explained by Otis Elevator’s lack of negligence? It seems not. A lack of cause in fact? No. Was it that Mrs. Bank was not a foreseeable plaintiff, or that the kind of harm she suffered was not a reasonably foreseeable result of the elevator company’s negligence? Unlikely. The true reason appears to be that her act of walking up and down the stairs, and slipping on the way down, had a great deal more to do with producing her harm than anything Otis Elevator did or did not do.

In the second example, *Rubin v. Pecoraro*, the plaintiff walked suddenly from between two parked cars without looking and ran into the side of defendant’s speeding car.<sup>235</sup> The appeals court reinstated the jury’s verdict for defendant, based on its finding that the defendant motorist was negligent but that the plaintiff’s negligence was the sole proximate cause of the harm.<sup>236</sup> The court said “we can properly consider the injured plaintiff’s actions, not on the issue of comparative negligence, but on the totality of the proof in the jury’s evaluation of the issue of proximate cause.”<sup>237</sup> The court opined that perhaps the jury had concluded that the defendant’s negligence in driving too fast, not looking, and not sounding a horn was simply not a substantial factor—that is, not a substantial causative factor when compared to what the plaintiff contributed—in plaintiff’s harm.<sup>238</sup>

Sometimes courts label a plaintiff’s conduct a superseding or sole proximate cause when they could just have easily said that the plaintiff failed to prove actual (“but for”) cause. In this usage, the courts use superseding or sole proximate cause as a proxy for a conclusion that “even if the defendant had done everything he should,

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233. *Id.* at 555.

234. *Id.*

235. *See* 529 N.Y.S.2d 142, 142-43 (N.Y. App. Div. 1988).

236. *See id.* at 143-44.

237. *Id.* at 144.

238. *See id.* at 143-44.

the plaintiff still would have suffered the same injury.”<sup>239</sup> A good example of this is found in a 1990 Florida case in which an eleven-year-old boy was injured when he fell from a piece of playground equipment owned and maintained by defendant homeowners’ association.<sup>240</sup> His lawsuit alleged that the defendant’s negligence in failing to adequately maintain the equipment was a proximate cause of his injuries. The court, affirming a summary judgment for defendant, said, “although faulty maintenance was alleged, this is of no consequence, as the proximate cause of [plaintiff’s] injuries was that of his own careless attempt to jump from the monkey bar to the slide.”<sup>241</sup> While the court explicitly rested its ruling on “sole proximate cause,” and quoted with approval a case denying recovery on grounds of “superseding” [sic] cause,<sup>242</sup> the most obvious ground for decision is that even had the playground equipment been properly maintained, plaintiff would still have been injured when he attempted his athletic but ill-fated leap.

At times, too, courts appear to use the superseding or sole proximate cause label to buttress or stand in for a conclusion that the defendant was not negligent, that is, that the defendant did not breach a duty. A half-century ago, Prosser identified “many cases” where the court applied superseding cause analysis to free defendants from liability “in which no harm at all was reasonably to be anticipated, either from the intervening cause or as the direct result of the defendant’s conduct. The proper holding in such cases is certainly that the defendant is not negligent, rather than that there is no ‘proximate cause.’”<sup>243</sup> The advent of pure comparative responsibility has not diminished this usage. As a more recent court put it,

A California plaintiff must still establish a prima facie case by proving that the defendant was negligent, and that that negligence was a proximate cause of his injuries. . . . Where either element of proof is lacking a nonsuit is justi-

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239. SCHWARTZ, *supra* note 6, § 21-6(b), at 439.

240. *See Ruiz v. Westbrooke Lake Homes, Inc.*, 559 So. 2d 1172, 1173 (Fla. Dist. Ct. App. 1990).

241. *Id.* at 1174.

242. *Id.*

243. Prosser, *Proximate Cause*, *supra* note 186, at 407 n.183 (citing 17 California cases decided between 1889 and 1941).

fied, and the label 'sole proximate cause' may properly be applied to plaintiff's conduct.<sup>244</sup>

A good example is found in *Burton v. City of Philadelphia*,<sup>245</sup> a 1991 Mississippi case. A pedestrian tripped on a hole in a city sidewalk and sued for her injuries. The court affirmed a summary judgment against her, noting first that "our comparative negligence law in this state applies and, unless the plaintiff's negligence is the sole proximate cause of the injury, the plaintiff is entitled to recover."<sup>246</sup> But on the undisputed facts that the city did not cause the hole, did not have notice of the hole, and had not failed to correct it after any alleged notice, the court concluded that "there was no showing of [defendant's] negligence . . . since the record reflects that appellant's negligence was the sole approximate [sic] cause of the accident."<sup>247</sup> The dissent argued that the court's determination was at odds with pure comparative fault, saying, "we often fail to remember that any percentage finding of negligence against the defendant can result in a verdict for the plaintiff."<sup>248</sup>

Superseding or sole proximate cause may also serve as a proxy for a conclusion of "no duty" on defendant's part to protect a particular plaintiff from a particular type of harm. This is, of course, Judge Cardozo's idea as expressed in *Palsgraf*, that defendants owe duties of care only to foreseeable plaintiffs.<sup>249</sup> Cardozo thus cast a question of proximate causation as a question of duty, over Judge Andrews's vigorous dissent.<sup>250</sup> Prosser regarded the problem of intervening cause in this way. After discussing a line of intervening cause cases, he concluded, "The issue here is not one of causation, which is be-

244. *Elder v. Pacific Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 657, 136 Cal. Rptr. 203, 206 (Ct. App. 1977) (citations omitted).

245. 595 So. 2d 1279 (Miss. 1991).

246. *Id.* at 1280.

247. *Id.* at 1281.

248. *Id.* (McRae, J., dissenting).

249. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) ("The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff. . . . Relatively to her it was not negligence at all.").

250. See *id.* at 105 (Andrews, J., dissenting) (arguing that duty was a broader concept, and that the jury should have been allowed to decide proximate causation either way).

yond all dispute, but of whether the defendant was under any duty to protect the plaintiff against the intervening cause. Once that question is answered in the affirmative, nothing whatever remains to be said.”<sup>251</sup> Some leading scholars, the foremost being Leon Green, have argued that proximate cause questions should be generally recast in this way. He observed that “most courts when they talk about proximate cause are dealing with some phase of the duty problem and not causal relation.”<sup>252</sup> That is because “[t]he problems dealt with under ‘proximate causation’ involve limitations upon legal responsibility or legal protection—the phase of legal theory concerned with rights and duties.”<sup>253</sup> From this perspective, a number of cases invoking superseding or sole proximate cause as the rationale for decisions are actually being decided on the ground that the defendant’s duty does not (or probably does not) encompass protecting this plaintiff from his own conduct.<sup>254</sup> Take, for example, the class of cases in which the plaintiff’s injury resulted from an unlucky encounter with an “open and obvious” hazard on defendant’s property.<sup>255</sup> Before the

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251. Prosser, *Proximate Cause*, *supra* note 186, at 401.

252. LEON GREEN, JUDGE AND JURY 242 (1930).

253. *Id.* at 196.

254. *See, e.g.*, Vann v. Town Topic, Inc., 780 S.W.2d 659, 661-62 (Mo. Ct. App. 1989) (holding that defendant bar owner owed no duty to plaintiff to protect him from injury in fight outside the bar, but nonetheless saying that “[t]he sole and precipitating cause of the attack on appellant was his decision to intervene in the melee”).

255. While the “open and obvious” hazard cases provide the best examples, other kinds of cases may also illustrate this “no duty” proxy function, such as negligent misrepresentation and fraud cases in which the plaintiff must prove “reasonable reliance” on the defendant’s misrepresentation as part of the prima facie case. RESTATEMENT (SECOND) OF TORTS §§ 537, 552 (1977). In such cases, the defendant’s duty is not to make misrepresentations upon which a reasonable person would rely, but some courts recast this as an issue of whether the plaintiff’s unreasonable reliance severed the causal chain. *See, e.g.*, Ralston Dry-Wall Co. v. U.S. Gypsum Co., 926 F.2d 99 (1st Cir. 1991) (citing to intervening cause cases, holding that plaintiff’s unjustifiable reliance rendered defendant’s negligent misrepresentation “not the proximate cause” of plaintiff’s loss under Rhode Island law). Courts sometimes hold that a plaintiff’s unforeseeable misuse of a product constitutes a superseding cause also, a holding which may be characterized as a proxy for the idea that a manufacturer owes no duty to protect a plaintiff from unforeseeable uses of its products. *See generally* William J. McNichols, *The Relevance of the Plaintiff’s Misconduct in Strict Tort Products Liability, the Advent of Comparative Responsibility*,

advent of comparative responsibility, such cases could be decided against plaintiffs on any number of doctrinal grounds. In a pure comparative scheme, however, the options are more limited. But courts often wish, for commonsense reasons, to authorize a jury to deny all recovery. When they so wish, they may allow the jury to conclude that the plaintiff's act in encountering the hazard was a superseding or sole proximate cause. For example, in *Reese v. Griffith*,<sup>256</sup> a Louisiana court affirmed a jury verdict for landowners in a slip-and-fall case. The appeals court noted that a landowner's "duty does not give rise to liability for injuries . . . if the danger should have been observed by the plaintiff in the exercise of reasonable care, or if it was as obvious to the individual as to the owner (or occupier) of the property."<sup>257</sup> The court, however, cast the case as one involving proximate causation, not duty. The plaintiff, who tripped over a dark-colored obstacle eight inches high that was protruding between parking spaces, "admitted attempting to take a short-cut over the planter to his car because of the inclement weather."<sup>258</sup> On these facts, the court found "no manifest error in the jury's finding," since "the jury may have believed that the accident was caused, legally and factually, through the plaintiff's own fault."<sup>259</sup> Thus the defendants paid nothing, despite the court's finding that they knew of the protruding object and "refused to correct it" even though it "create[d] an unreasonable risk of harm."<sup>260</sup>

Similarly, a Washington court affirmed a jury verdict for the defendant landowner where the plaintiff, a social guest, had tripped over a bedspread after she had made up the bed.<sup>261</sup> The jury had been instructed on open and obvious hazards as well as on superseding cause, and found in a special verdict that the defendants were negligent but that their negligence was "not the proximate cause" of

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and the Proposed Restatement (Third) of Torts, 47 OKLA. L. REV. 201 (1994); Mark E. Roszkowski & Robert A. Prentice, *Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis*, 33 ST. LOUIS U. L.J. 19, 68-81 (1988).

256. 568 So. 2d 1146 (La. Ct. App. 1990).

257. *Id.* at 1150.

258. *Id.* at 1151.

259. *Id.*

260. *Id.* at 1150.

261. *See* *Daly v. Lynch*, 600 P.2d 592 (Wash. Ct. App. 1979).

plaintiff's injury.<sup>262</sup> Affirming, the appeals court said that there was sufficient evidence to support a finding that the plaintiff's "own failure to exercise reasonable care to avoid a danger known to her was an independent, as contrasted with a concurring, cause of her injury which broke the chain of causation set in motion by defendant's negligence."<sup>263</sup> As an alternative ground, the court noted that the defendants did not owe plaintiff a duty because she "had equal reason to know of the condition" of the bedspread.<sup>264</sup>

To take another example, in an FTCA case from Florida, the plaintiff was a public invitee in a national forest who tripped over a parking barrier next to her campsite and sued the government for her injuries.<sup>265</sup> Evidence at trial indicated that the plaintiff was aware of the barrier and that lanterns illuminated the area at the time of the accident.<sup>266</sup> On these facts, the court granted judgment for defendant, saying "there is no duty to warn an invitee of visible or obvious hazards," and explicitly finding that plaintiff's "negligence was the sole proximate cause of her injury" as a matter of law.<sup>267</sup> Since plaintiff's "negligence was the sole proximate cause of her injury," the court concluded, "she is barred from recovering damages."<sup>268</sup>

In summary, anyone who reads more than a handful of cases that use the terms "sole proximate cause" or "superseding cause" against plaintiffs can see that at times, other existing doctrines could have been invoked to reach the same result. This is not particularly problematic, since the same criticism undoubtedly could be mounted at a score of tort doctrines. Redundancy has rarely been thought a sufficient reason to abandon a long-standing doctrine,<sup>269</sup> it has long

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262. *Id.* at 594.

263. *Id.* at 597.

264. *Id.*

265. *See* Trowell v. United States, 526 F. Supp. 1009 (M.D. Fla. 1981) (applying Florida law).

266. *See id.* at 1012.

267. *Id.* at 1013.

268. *Id.*

269. *See* GREEN, *supra* note 252, at 26 ("Probably the most extravagant network of theories employed in tort cases is found in the negligence group. . . . There are very few negligence cases, if any, which cannot be stated in at least several . . . theories. One lawyer or one judge will insist that a problem to be decided is a question of legal duty, another a question of assumed risk, still an-

been recognized that tort doctrines tend to travel in packs.<sup>270</sup> And, as G. Edward White so well put it, “for all the impressive scholarly energies directed at the unification, simplification, and ordering of tort law, the field seems to have an inherent capacity to lapse into disorderliness, inconsistencies and complexities.”<sup>271</sup> There is thus nothing particularly unusual or troubling about the proxy function generally served by the doctrines of superseding or sole proximate cause.

### C. Judge and Jury Functions

The doctrines of superseding or sole proximate cause against plaintiffs also function at times as devices to shift the decisional responsibility between judge and jury. At times, the superseding or sole proximate cause doctrine is used to take a case away from a jury, in essence to direct a verdict for a defendant rather than allowing a jury to give an extraordinarily faulty plaintiff even a reduced recovery. Courts have not hesitated to take cases away from juries where a plaintiff’s conduct is so “extraordinary” as to be unforeseeable as a matter of law.<sup>272</sup> A good example is found in *Mack v.*

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other a question of contributory negligence, while the appellate court may say it is one of proximate cause.”).

270. Green, after quoting two authors who asserted that legal principles are in the habit of traveling or hunting in pairs, asserted quite correctly that “it is more accurate to say that these principles and rules travel and hunt in ‘packs’ instead of ‘pairs’ and that it is seldom that there are as few as a ‘pair’ in a ‘pack.’” *Id.* at 27 n.2 (quoting John Dickinson, *The Law Behind Law: II*, 25 COLUM. L. REV. 285, 298 (1929), and W.W. Cook, 38 YALE L.J. 405, 406 (1929)).

271. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 243 (1980).

272. *See, e.g.*, *Kuras v. International Harvester Co.*, 820 F.2d 15 (1st Cir. 1987) (applying Rhode Island law, directed verdict for defendant affirmed where plaintiff’s act in placing his hand into spinning lawnmower blade constituted an intervening act, precluding recovery against the manufacturer); *Falcone v. City of New York*, 566 N.Y.S.2d 352 (App. Div. 1991) (motion to dismiss granted in case where decedent used chemicals to clean up water damage to floor allegedly caused by city’s negligence in causing flood); *Zieker v. Orchard Park*, 538 N.Y.S.2d 671 (App. Div. 1989) (plaintiff’s dive into shallow water was sole proximate cause as a matter of law); *Griffith v. City of New York*, 507 N.Y.S.2d 445 (App. Div. 1986) (dismissal proper where decedent, allegedly negligently denied medical help at public school, went home and fell out of an open apartment window).

*Altmans Stage Lighting Co.*<sup>273</sup> The plaintiff, a repairman, was working on the roof of defendant's building when the wind blew down his ladder. Defendant was under a statutory duty to furnish safe ladders and other devices for repair and maintenance jobs. The court noted that it was customary for workers to secure their own ladders to buildings, but plaintiff did not do so on this occasion. Despite being in "no immediate danger," plaintiff "found an old, worn rope in a hatchway and decided to use the rope to lower himself from the roof. The rope broke and he plunged to the ground," suffering serious injuries when he hit the sidewalk twenty-eight feet below.<sup>274</sup> On these facts, the trial court dismissed plaintiff's claim, and the appellate division affirmed. The court went through a lengthy discussion of intervening cause, concluding that plaintiff's conduct was "unforeseeable and independent of defendant's breach of duty," and adding, "[t]he failure of the defendant to properly anchor the ladder had nothing to do with plaintiff's attempt to reach the street via the rope."<sup>275</sup> Had plaintiff simply waited on the roof, or asked someone to summon help, he would not have been injured, said the court.<sup>276</sup> The *Mack* case well represents the use of superseding cause to control jury discretion, which might be exercised to make the slightly negligent defendant (or a very negligent defendant whose conduct plays a very small *causal* role in the harm) pay a small percentage of a large amount of damages. While the amount of damages was never discussed in the case, the severity of plaintiff's injuries would mean that if the jury were allowed to find that the defendant was only five percent or ten percent responsible, the plaintiff still would have received a substantial judgment. Controlling jury discretion which might be exercised to make a negligent defendant pay *all* of plaintiff's damages was, of course, one of the central functions of contributory negligence as a complete bar;<sup>277</sup> the ameliorative simi-

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273. 470 N.Y.S.2d 664 (App. Div. 1984).

274. *Id.* at 666.

275. *Id.* at 668.

276. *See id.*

277. *See, e.g.,* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 163-77 (1946) (an excellent, succinct historical analysis of the use of contributory negligence to control jury discretion).

larity is striking,<sup>278</sup> although today's amelioration is arguably to a milder effect since it prevents a jury only from making a slightly negligent defendant pay *some* of plaintiff's damages.

To take another good example, in *Lionarons v. General Electric Co.*,<sup>279</sup> a New York court affirmed the trial court's grant of summary judgment for defendant landowner in a case brought by a man who dove into shallow water. The court found it "significant" that plaintiff was an experienced swimmer "who was well aware of the hazards inherent in diving in natural settings," and who "admitted observing from the diving board gradations in water color . . . which differentiated the deep water areas from the shallow areas."<sup>280</sup> On these facts, the court said, the trial court was justified in holding that the plaintiff's dive "was a superseding act of negligence absolving defendants of any negligent conduct."<sup>281</sup> Thus, the defendant owed nothing in a pure comparative regime and did not even have a jury case, even though the court explicitly noted that the defendants were negligent in permitting trespassers to use their property and in maintaining a trash can on their property.<sup>282</sup>

More commonly, however, courts invoke the doctrines of superseding and sole proximate cause not to take a case away from the jury, but to justify giving it *to* the jury. The framing of an issue as one involving proximate cause generally or intervening cause specifically thrusts the judgmental responsibility onto the jury (ostensibly to resolve numerous fact questions) and frees the court from making a difficult decision, perhaps on duty grounds.<sup>283</sup> This has long been common in this country, and should surprise no student of

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278. "Courts wanted to control juries during the last century, they want to control them today, and they will probably want to continue to control them in the future. If we take away contributory negligence from the judges, they will find some other way. It's hard to beat judicial ingenuity." *Id.* at 182.

279. 626 N.Y.S.2d 321 (1995).

280. *Id.* at 322.

281. *Id.*

282. *See id.*

283. "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it." *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 474 (1876).

the American courts.<sup>284</sup> Indeed, it is the institution of the jury that truly makes possible the kinds of often subtle judicial modifications of pure comparative responsibility discussed above. By ultimately turning over to the jury the issue of whether plaintiff's conduct was so significant, or so faulty, or so bizarre, as to warrant the complete denial of relief, courts empower juries to arrive at rough, but hopefully just, determinations in cases where applying the "unameliorated" letter of the law of pure comparative fault would work an injustice on a slightly negligent defendant.<sup>285</sup> Seen in this light, one major salutary function of superseding cause and sole proximate cause is to provide the jury a doctrinally acceptable way to avoid giving any damages to an overwhelmingly negligent plaintiff even after the adoption of pure comparative responsibility. Florida's formulation is illustrative. Florida courts hold that summary judgment is properly granted to a defendant in a negligence case if defendant can prove that "there was no negligence, or that the plaintiff's negligence was the sole proximate cause of the injury."<sup>286</sup> They also hold, however, that this burden is "onerous," especially after the 1973 adoption of comparative negligence and the 1977 abolition of assumption of

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284. "There undoubtedly has been a very definite tendency of the courts, which has even received judicial recognition, to avoid consideration and analysis of the more difficult problems, and to abdicate decision by leaving the entire set of troublesome issues to the twelve men in the box." Prosser, *Proximate Cause*, *supra* note 186, at 420 (citing *Williams v. San Francisco & Northwestern R.R.*, 6 Cal. App. 715, 724, 93 P. 122 (Ct. App. 1907) (noting a "disposition of the courts to leave all doubtful cases to the jury")). For a succinct history of the evolution of proximate cause from a legal question to a question of fact to be decided by the jury, see HORWITZ, *supra* note 30, at 54-63.

285. *See, e.g.*, *Weller v. Colleges of the Senecas*, 635 N.Y.S.2d 990 (App. Div. 1995) (genuine fact issues as to whether plaintiff's act in riding bicycle on a path after dark was the sole proximate cause of his injuries in suit against the landowner for negligently maintaining the path); *Shutak v. Handler*, 599 N.Y.S.2d 24 (App. Div. 1993) (genuine fact issues as to whether tenant's act in getting up on chair in an attempt to repair her ceiling was a superseding cause of her harm in suit against her landlord for failing to repair the ceiling himself); *Walter v. Niagara Mohawk Power Corp.*, 598 N.Y.S.2d 416 (App. Div. 1993) (genuine fact issues as to whether plaintiff's act in diving from bridge into shallow river was sole proximate cause of his injuries in suit against power company that controlled water level of river through a series of dams).

286. *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29, 31 (Fla. 1977).

risk as an absolute defense, and that the movant must show lack of negligence or plaintiff's sole proximate cause "unequivocally."<sup>287</sup> Obviously, this is indeed an onerous burden, which is rarely met by defendants in Florida courts.<sup>288</sup> This simply means that juries, not judges, make the ultimate determination of whether a plaintiff's negligence is so overwhelming as to be the sole proximate cause of the harm.

One problem with presenting a jury with the issue of whether a plaintiff's negligence is a superseding cause, or the sole proximate cause, of his harm is that such terminology tends to be confusing, even befuddling. Indeed, that the doctrines of superseding and sole proximate cause often confuse bench, bar, and jury can hardly be denied. One source of confusion perhaps has to do with the words themselves. As a number of courts have noted, intervening and superseding cause are terms that appear on their face to apply only to third parties or to forces other than a plaintiff or a single defendant.<sup>289</sup> The Restatement explicitly defines a superseding cause as "an act of a third person or other force" that cuts off a defendant's liability,<sup>290</sup> a definition that seems tortured if interpreted to include the

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287. *Id.* at 30-31.

288. See, for example, cases all ruling against defense summary judgments where defendant had argued plaintiff's sole proximate cause: *Hervey v. Alfonso*, 650 So. 2d 644 (Fla. Dist. Ct. App. 1995) (plaintiff slipped on defendant's wet floor); *Nicosia v. Otis Elevator Co.*, 548 So. 2d 854 (Fla. Dist. Ct. App. 1989) (plaintiff injured escaping from stalled elevator); *Chelton v. Tallahassee-Leon County Civic Ctr. Auth.*, 525 So. 2d 972 (Fla. Dist. Ct. App. 1988) (plaintiff fell down stairs in defendant's building); *Bradford v. Bernstein*, 510 So. 2d 1204 (Fla. Dist. Ct. App. 1987) (same); *Cutler v. St. John's United Methodist Church*, 489 So. 2d 123 (Fla. Dist. Ct. App. 1986) (17-year-old girl drowned on swimming trip organized and supervised by defendant); *Stahl v. Metropolitan Dade County*, 438 So. 2d 14 (Fla. Dist. Ct. App. 1983) (decedent struck by car in street after leaving bike path maintained by defendant); *Nurdin v. Anheuser-Busch, Inc.*, 392 So. 2d 928 (Fla. Dist. Ct. App. 1980) (plaintiff tripped over hose left lying on walk on defendant's property); *St. Martin v. Allstate Ins. Co.*, 367 So. 2d 1077 (Fla. Dist. Ct. App. 1979) (pedestrian struck by car driven by defendant); *U.S. Fire Ins. Co. v. Progressive Cas. Ins. Co.*, 362 So. 2d 414 (Fla. Dist. Ct. App. 1978) (plaintiff's car struck by defendant's car).

289. See, e.g., *Chambers v. Bunker*, 598 S.W.2d 204, 207 (Mo. Ct. App. 1980).

290. RESTATEMENT (SECOND), *supra* note 34, § 440.

plaintiff's own conduct, although a large number of courts indulge in that torture. Sole proximate cause is not a model of clarity, either. First, the word "sole" is surplusage, since the term is invoked simply to express the idea that one party, not any other, is a proximate cause of harm; to label the plaintiff's negligence as "the sole proximate cause of harm" is the same as saying that the plaintiff has failed to prove that the defendant is *a* proximate cause of harm. Second, one cannot be certain of the term's precise meaning in any given jurisdiction without knowing what matters fit under the umbrella term "proximate cause." Some states use the term "proximate cause" to mean something other than actual cause or cause in fact; other states use the term "proximate cause" to *include* cause in fact.<sup>291</sup> In those latter states, "sole proximate cause" could literally mean a failure of actual causation. Finally, even within a single jurisdiction, one sometimes finds the term "sole proximate cause" transmogrified into "sole and proximate cause."<sup>292</sup> This usage connotes, and perhaps denotes, that the word "sole" does not modify "proximate cause" at all, but only the word "cause," again implying that the conduct at issue is the sole *actual* cause of harm. At best, this variation does little to cut through the fog that would exist even in its absence.

Proximate cause itself has been called "a tangle and a jungle, a palace of mirrors and a maze."<sup>293</sup> Several early, brilliant torts scholars unequivocally concluded that it was impossible to develop an

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291. See, e.g., *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1049, 819 P.2d 872, 876, 1 Cal. Rptr. 2d 913, 917 (1991) ("One of the concepts included in the term proximate cause is cause in fact, also referred to as actual cause."); *Stahl*, 438 So. 2d at 17 ("It seems clear at the outset that the 'proximate cause' element of a negligence action embraces, at the very least, a causation-in-fact test . . .").

292. See, e.g., *Gavagan v. United States*, 955 F.2d 1016, 1018 (5th Cir. 1992) (affirming district court's finding that "plaintiff's actions were the sole and proximate cause of his own injuries") (emphasis omitted); *Chesapeake & Ohio Ry. v. Newman*, 243 F.2d 804, 808 (6th Cir. 1957) (plaintiff whose negligence was the "sole and proximate cause" of his own injury cannot recover).

293. Prosser, *Proximate Cause*, *supra* note 186, at 369 (also cautioning that "[e]verything worth saying on the subject has been said many times, as well as a great deal more that was not worth saying," a caution that has been honored more in the breach).

overarching theory of proximate cause,<sup>294</sup> and it is not at all clear that matters have gotten any easier.<sup>295</sup> In part perhaps because of the inability of scholars and courts to work out and apply generalized principles consistently, “[t]here is a decided tendency to leave every question [of proximate cause] to the bewildered jury, under some vague instruction which provides no effective guide.”<sup>296</sup> The doctrines do have the potential to vex juries. As the Minnesota Supreme Court said, “the question of what is an intervening cause which will supersede the original negligence of the wrongdoer always presents difficulties. The difficulty arises not so much with the rules of law in themselves as to the application of them to a given set of facts.”<sup>297</sup> And a New Mexico judge concluded that “scholarly judges are able to define ‘proximate cause,’ but none can explain it. They can pierce the meaning of each of the various causes that defy the minds of the average juror. . . . Ignorance of the meaning of the law is ignorance in action.”<sup>298</sup>

At bottom, the use of these proximate cause doctrines to shift responsibility either to, or—more commonly—away from judges must be done with some circumspection, and juries should not be handed overly puzzling legal formulations without good reason. But as long as proximate cause is regarded as a jury question, it is difficult to ar-

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294. See, e.g., POLLOCK, *supra* note 31, at 39 (beginning to discuss the “rule of ‘natural and probable consequences,’” noting that “we must remember that it is not a logical definition, but only a guide to the exercise of common sense”); Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924) (“[I]t neither is nor should be possible to extract from the cases rules which cover the subject and are definite enough to solve cases.”); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 303, 317 (1912) (concluding that all attempts at making the law of causation certain have “resulted in propounding rules which are demonstrably erroneous”). See generally Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928) (decrying an attempt to restate tort law as “a most hopeless task”).

295. See, e.g., SPEISER ET AL., *supra* note 18, § 11:22, at 457 (speaking of proximate cause, asserting that “an almost innumerable series of particular events, concerning virtually every conceivable sort of negligence situation, has been involved in these cases—with the usual contrary results, the usual ad hoc determinations, and the seeming irreconcilability of specific cases”).

296. PROSSER & KEETON, *supra* note 9, § 45, at 319.

297. *Sowada v. Motzko*, 98 N.W.2d 182, 187 (Minn. 1959).

298. *Armstrong v. Industrial Elec. & Equip. Serv.*, 639 P.2d 81, 86-87 (N.M. Ct. App. 1981) (Sutin, J., concurring).

gue that juries are somehow not entitled, in proper cases, to receive more specific doctrinal guidance toward their decision via instructions on superseding cause or sole proximate cause.

## V. CONCLUSION

Some of the criticisms of the use of superseding or sole proximate cause to bar negligent plaintiffs are accurate, but not particularly forceful. Often, these doctrines are unclear and redundant in application. Courts should not intentionally be unclear in their usages; certainly, for example, the doctrine of superseding cause should arise as an issue in a case only when it may fairly be said that the plaintiff's subsequent negligent act was not reasonably foreseeable to the defendant. That a doctrine is unclear and redundant, however, hardly stands as a reason for its elimination; if it did, most tort doctrines would stand equally condemned. Tort doctrines "are flexible and open-ended and the contours of those doctrines often are filled in by juries rather than by legal elites."<sup>299</sup> Such rules can never be pristine in their clarity. As Leon Green put it, "[t]he most a legal science can do with the classes of cases here involved is to employ broad formulas both for judge and jury and rely upon their respective judgment-passing capacity to dispose of the cases satisfactorily as they arise."<sup>300</sup> The open quality of tort doctrines serves as a check on the power of legal elites, including, most notably, academics, who generally urge clarification and simplification.<sup>301</sup>

We must also be content to live with a host of superfluous rules in tort law. Indeed, redundancy in tort law is probably more good than bad. It has long been the law that "[e]ach party to a lawsuit has a right to have the court give instructions stating the law applicable to the evidence presented by such party, so that if the jury find the facts in accordance with such evidence they may correctly apply

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299. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress As a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 580 (1993).

300. GREEN, *supra* note 252, at 57-58.

301. See WHITE, *supra* note 271, at 243 ("The capacity of law in America to resist serving as an orderly system of social control is at least as strong as the impulse of legal theorists to make it so serve.").

the law thereto.”<sup>302</sup> The almost infinite variety of fact patterns in tort law and the creativity of tort lawyers produce a sufficiently great number of legal theories and a corresponding need for a great

number of overlapping and largely redundant sub-doctrines on which to hang those theories.

Last but not least, the complaint that it undercuts pure comparative responsibility to bar an overwhelmingly negligent plaintiff’s recovery on the ground that such conduct is a superseding or sole proximate cause largely misses the point that such use of these doctrines serves to soften the potentially harsh consequences of pure comparison on particular defendants in particular cases. Such a function is not at all inconsistent with *preservation of* pure comparative systems, as opposed to the *theory* behind such systems, and represents a doctrinal safety valve that is necessary for pure comparison to remain acceptable and thus viable.<sup>303</sup>

Of course, the critics are right that these doctrines, if not used cautiously, can undercut pure comparative responsibility systems and do more harm than good. Courts should strive to invoke them only in situations where a plaintiff’s fault, or causal contribution, is truly extraordinary, overwhelming, or gross compared to that of the defendant. Where the facts do not support such a conclusion, courts should not utilize these doctrines and should not instruct juries on them. By and large, the case law does not demonstrate such widespread misuse.

In closing, it is hard to see how pure comparative responsibility can survive without some subsidiary doctrines that serve as a safety

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302. *Sampsell v. Rybczynski*, 82 N.E. 244, 246 (Ill. 1907).

303. One might ask whether contributory negligence would have survived as long as it did without ameliorating doctrines such as last clear chance. *See* PROSSER & KEETON, *supra* note 9, § 66, at 464 (suggesting that the effect of last clear chance was not to move contributory negligence toward a comparative system, but rather to “freeze” that transition). Those who would like to see pure systems modified directly then, might well be right to call for the abolition of the doctrines of superseding and sole proximate cause to bar plaintiffs’ claims. *Cf.* Robertson, *Causation Confusion*, *supra* note 174, at 29 & n.121 (suggesting in passing that states might adopt a system under which a plaintiff is barred if 80% or more at fault, noting that there is “nothing magic” about the 50 or 51% level that almost all modified comparative states have adopted).

valve in hard cases. Superseding and sole proximate cause serve such a function today and courts that have found them useful tools to achieve a measure of flexibility are not likely to surrender them lightly.<sup>304</sup> Yes, *Butterfield* rides again. But seen properly, it is not the *Butterfield* that barred the slightly negligent plaintiff from all recovery. It is the *Butterfield* that barred the plaintiff who foolishly rode his horse at full gallop into the pole that could be seen at one hundred yards, with room to ride around. It is Bayley's *Butterfield*, where it could fairly be said that given the plaintiff's degree of fault and causal contribution, "the accident appeared to happen entirely from his own fault."<sup>305</sup>

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304. See GREEN, *supra* note 252, at 223 (stating that the phraseology of causation "has served but one useful function, and that has been to give the judges a dependable way out of difficult situations when they have made up their minds but either do not know how, or else do not take the time, to articulate their conclusions on a rational basis . . . it has served this function well"); Thomas C. Galligan, Jr., *Cats or Gardens: Which Metaphor Explains Negligence? Or, Is Simplicity Simpler than Flexibility?*, 58 LA. L. REV. 35, 66 (1997) (noting that criticisms of the use of sole proximate cause against plaintiffs have met with only limited success because "courts continue to flexibly approach negligence problems").

305. *Butterfield v. Forrester*, 103 Eng. Rep. 926, 927 (K.B. 1809).