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Torts--Intervening Cause--Foreseeability

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evidence" the court leaves a possibility, however, for review of the agency's opinion.

In conclusion, there will probably not be any more cases in which the circuit court judge makes a trip to the property to determine if it would be a good place to have a shopping center.\textsuperscript{15} Permissible scope of judicial review will be on the basis of:

1. Action in excess of granted powers with a presumption of a lack of any power not explicitly enumerated by the legislature.
2. Lack of procedural due process with a requirement that the statute itself enumera\textit{te} a procedure which meets the standards of due process quite apart from whether due process was in fact achieved in the case.
3. Lack of substantial evidentiary support, \textit{i.e.}, whether evidence was heard and whether there is any evidence to support the finding, or whether a reasonable man could reach the same conclusion.

It is submitted that this will make zoning board rulings extremely difficult, if not impossible, to overturn. This is regrettable since it grants power to effectively take the most profitable uses of private property without the judicial restraint which the legislature intended when it enacted the KRS 100.057 \textit{de novo} provision. Hopefully, when the proper case arises, the court will construe review on the "clearly erroneous" question to permit some latitude of judgment as to the weight of the evidence presented to the board.

\textit{Courtney F. Ellis}

\textbf{TORTS—INTERVENING CAUSE—FORESEEABILITY.—} The plaintiff sustained injuries when she fell through a trap door left open by a tenant in the unlighted hallway of a building. The plaintiff claimed that the negligence of the defendant, the owner of the building, in failing to light the passageway, was a concurring proximate cause of her injuries. \textit{Held:} Judgment for the plaintiff was reversed with directions that the defendant be given a judgment \textit{n. o. v.} "Granted that appellant may have been negligent in failing to keep the passageway lighted, the independent act of negligence by the tenant, without which the accident could not have occurred, was an act the appellant

\textsuperscript{15} Louisville and Jefferson County Planning and Zoning Comm'n v. Cope, 318 S.W.2d 842 (Ky. 1958).
could not reasonably have been expected to foresee.” *Bengold Properties, Inc. v. Crook*, 377 S.W.2d 56 (Ky. 1964).

Kentucky has a rule which is as workable as most rules of law in this difficult field, but the court is inconsistent in its application of the rule. In order for an intervening cause to bar recovery in Kentucky, it must be a superseding cause.\(^1\) It is a superseding cause and the first actor is not liable if the intervening cause is unforeseeable. The Kentucky Court of Appeals has held an intervening act to be unforeseeable if it was unusual and extraordinary.\(^2\) Where the intervening cause was common and ordinary, the court has held otherwise.\(^3\)

The Kentucky rule resembles the American Law Institute’s old view as stated in Restatement of Torts, Sec. 442(b). The Institute took the position that in determining whether an intervening force is a superseding cause, it is important to consider whether its operation appears, after the event, to be extraordinary rather than normal in view of the circumstances.\(^4\) The Kentucky rule was stated as follows in *Hines v. Westerfield*:\(^5\)

> To be proximate cause, a cause is not required to be the last link in the chain of events. An act or force may intervene without breaking the chain of cause and effect, so long as the intervening force or act is not the superseding cause.

> If the original act set in force a chain of events which the original negligent actor might have reasonably foreseen would, according to the experience of mankind, lead to the event which happened, the original actor is not relieved of liability by the intervening act.\(^6\)

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1. Louisville & N. R.R. et al. v. Powers, 255 S.W.2d 646 (Ky. 1953); Hines v. Westerfield, 254 S.W.2d 728 (Ky. 1953).
2. Carr v. Kentucky Utilities Co., 301 S.W.2d 894 (Ky. 1957) (negligence of defendant in rigging a high tension wire close to the ground superseded by decedent’s deliberate act of attempting to put up a television antenna next to it); Dixon v. Kentucky Utilities Co., 295 Ky. 32, 174 S.W.2d 19 (1943) (gross negligence of an automobile operator).
3. Ambrosius Industries v. Adams, 293 S.W.2d 230 (Ky. 1956) (defendant’s negligence in rigging a load was not superseded by the negligence of the second defendant in loading it); Criswell v. City of Jackson, 257 Ky. 232, 77 S.W.2d 622 (1934) (where defendant, city allowed rock pile to remain on the street its negligence was a concurring cause of injuries sustained by a pedestrian when a negligently driven truck was diverted from its path by the rock pile); City of Bowling Green v. Peterson, 199 Ky. 311, 251 S.W. 187 (1923) (where truck load of fodder brushed up against a negligently maintained pole, city, could reasonably have anticipated that a vehicle would brush against it); Brown v. Chesapeake & O. Ry., 135 Ky. 723, 123 S.W. 295 (1909) (acts of third persons in putting in motion an unlocked turntable, whereby a child was injured, was held not to relieve the railroad from liability for its negligence in failing to make it secure); United States Natural Gas Co. v. Hicks, 134 Ky. 1, 119 S.W. 166 (1909) (where defendant negligently maintained a gate valve he could reasonably foresee that a child would ignite the leaking gas with a match).
5. 254 S.W.2d 728 (Ky. 1953).
6. Id. at 729.
In that case the defendant's car was parked so as to protrude into the street. The court said it was unforeseeable to the defendant that a third car would be forced to the other side of the road and cause the plaintiff to drive into a ditch. It was held to be a superseding cause. By comparing the *Hines* case to one which was decided a short time before, *Bosshammer v. Lawton*, it is easy to see that the application of the Kentucky rule of intervening cause is very uncertain. In the *Bosshammer* case, the defendant left his car standing on the traveled portion of the highway opposite the entrance to a public garage at the base of an icy hill, in violation of a statute. The court held it was foreseeable that a third party would pull his automobile out onto the highway from the garage in front of the plaintiff who was proceeding down the hill, causing the plaintiff to run into the third party.

As precedent, these two cases, like most Kentucky cases on intervening cause, must be limited narrowly to their facts. All that can be concluded from the two cases is that the court thought it not foreseeable under the circumstances of the *Hines* case that a motorist might be driving on the wrong side of the road, while in the *Bosshammer* case it thought it foreseeable that a person might pull out in front of another car. There is a valid distinction between the two cases. The negligence of the defendant in the *Bosshammer* case was thought to create a greater risk, because his car covered a greater portion of the highway and because the highway was icy.

Valid though the distinction is, it is minute when one considers the fact that in *Bosshammer* the negligent actor was held to answer in damages and in *Hines* he escaped liability completely. The distinction becomes a greater problem when one considers that such distinctions must serve as guidelines for trial courts and attorneys. These are major policy considerations which should enter into the application of the intervening cause rule. The rule should be applied so as to place the loss on those who should justly bear the loss, and in such a manner that trial courts can apply it with reasonable accuracy.

At the present time, if there is any degree of actual causation between the first actor's negligence and the injury, whether or not there is legal causation is a toss up if there was an intervening cause. One possible solution to this dilemma would be for the Kentucky court to adopt the view now taken by the American Law Institute:

> Where the actor's conduct creates or increases the risk of a particular harm, and is a substantial factor in causing that harm, the fact that the harm is brought about by the intervention of another force does not

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7 237 S.W.2d 520 (Ky. 1951).
relieve the actor of liability, except where that force is the intentionally tortious or criminal act of a third person.⁸

According to comment b of Sec. 442B, it is immaterial to the actor's liability that the harm is brought about in a manner which no one in his position could possibly have been expected to foresee or anticipate. The Restatement rule, if adopted by the court, would give trial courts and lawyers a more concrete standard to work with in dealing with cases involving intervening cause. The rule would lend itself to a more consistent application than the present Kentucky rule. Finally, it would force citizens to become more cognizant of the dangers and traps which they, through their negligence, lay for an ever increasing number of people likely to come into contact with them.

If, however, the court considers the tentative Restatement rule too harsh, it should at least widen the gap between those acts which it considers to be foreseeable and those which it considers to be unforeseeable and hold only those truly extraordinary acts to be superseding causes.

Robert J. Greene

CONSTITUTIONAL LAW—RIGHT TO COUNSEL.—Danny Escobedo, a twenty-two-year-old was arrested and taken to police headquarters for interrogation in connection with a fatal shooting. Escobedo made several requests to see his lawyer which were denied even though the lawyer was present in the building. The accused was not advised by the police of his right to remain silent and, after persistent questioning by the police, made a damaging statement which was admitted at the trial. The state's highest court saw the confession as voluntary, and sustained the conviction.¹ Held: Reversed.

Where ... the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment as made obligatory upon the states by the Fourteenth Amendment, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. Escobedo v. Illinois, 378 U.S. 478 (1964).

The question is when the right to counsel begins. Escobedo provides that it attaches when the police investigation has begun to

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¹ People v. Escobedo, 28 Ill. 2d 41, 190 N.E.2d 825 (1963).