When the mortgagor possesses a positive equity he should be allowed depreciation deductions and he should be charged for depreciation in gain computation. Generally the mortgagor eventually will redeem the property, and the economic loss caused by depreciation is suffered by him. But where the mortgagor has a zero equity, he will not, in most cases, redeem the property; thus the economic loss of depreciation will not fall upon him. Since the economic loss will not be suffered by the mortgagor, he should not be permitted tax deductions for that loss.

The circuit court makes no attempt to approximate economic reality within the limitations of the tax system. It grants depreciation to every mortgagor and charges him with such deductions in gain computations regardless of the actual economic interest possessed by the mortgagor. This approach to the problem gives harsh results in unusual situations such as the instant case.[34] Such harshness is not necessary in order to attain a workable tax system. Limiting depreciation deductions by mortgagors to situations where they have a positive book equity would more closely approximate reality. It would grant depreciation to those who suffer economic loss due to depreciation, and deny it to those who do not. It would tax those who receive an actual gain on a sale but eliminate theoretical gain where none actually has been received.

Torts—Manufacturer's Liability—Intervening Negligence—[Tennessee].—The plaintiff, driving an automobile as a guest of the owner, was injured in an accident which resulted when a defective hood catch allowed the hood to fly up and block the driver's vision. The car in question had been through a number of sales—from the defendant manufacturer to the local dealer, then to one of its salesmen for use as a demonstrator, and, after he was no longer employed by the dealer, to the present owner. After the first cars of this model had been put on the market, the defendant discovered that each car had a defective catch on the hood. To remedy this the defendant distributed auxiliary catches to all

for more than a three-year period. See note 13, supra. To the extent that reopening of past returns is permitted, such returns will be reopened and depreciation deductions granted. This reopening of returns is quite desirable since it results in depreciation being taken by the persons that hindsight shows should be permitted to do so. Where the statute of limitations would bar reopening of returns, depreciation not allowed will have to be included in final gain computations. There would be little reason for the individual taxpayer to deliberately mortgage his property in order to defer depreciation deductions. Interest charges on the mortgage would more than counterbalance any tax advantage to be achieved.

[34] It is recognized that since Mrs. Crane received depreciation deductions, the suggested solution permits a double depreciation allowance. But this double deduction is permitted only because the statute of limitations prohibits reopening of past tax returns. See note 13, supra. The impossibility of reopening past tax returns should not determine the applicability of a plan designed to avoid such difficulty in future cases. One possible legislative solution of the double deduction problem would be extension of the present ability to reopen past tax returns to cover erroneous depreciation deductions. See Revenue Act of 1938, § 820, 52 Stat. 581 (1938), 26 U.S.C.A. § 3801 (1940).

dealers with instructions to attach them to all cars as a precautionary measure. At that time the car in question was owned by the salesman who, believing the catch to be unnecessary, failed to have it attached to the car. In the plaintiff's action against the defendant manufacturer for negligence, the trial court refused to let the question of the manufacturer's negligence go to the jury; the intermediate appellate court reversed this decision. On appeal to the Supreme Court of Tennessee, *held*, that the intervention of the salesman's act, which was independent, efficient, conscious, and not to be anticipated, destroyed the causal connection between the defendant's negligence and the accident and thus relieved the defendant of liability. *Ford Motor Co. v. Wagoner*.[1]

Since the decision in *MacPherson v. Buick Motor Co.*,[2] manufacturer's liability to either remote vendees or third parties has been extended and expanded.[3] This policy is founded upon the realization that the manufacturer has the means not only to minimize this risk most effectively but also to distribute the burden of the risk to the consumer. Aside from these two considerations, however, the method of analysis and treatment has remained essentially the same as in any simple negligence case—the standard of the reasonably prudent man, the extent of the defendant's duty, and the issue of proximate causation still being the cornerstones of liability. The problem of intervening conduct presented by the instant case lies within the realm of the last of these three issues.

Proximate cause is not merely a question of factual connection between negligent conduct and injury; for liability to ensue there must be a closer relationship between the two.[4] Frequently two consecutive acts have combined to produce the ultimate injury, and the court is forced to decide whether either, both, or neither of the acts involved should imply liability.[5] If the more remote

[1] 192 S.W. 2d 840 (Tenn., 1946).

[2] 217 N.Y. 382, 111 N.E. 1050 (1916).

[3] The MacPherson case established a duty of care to a remote vendee in respect to the manufacture of automobiles which, when defective, involve quite obvious danger to the consumer. Subsequent decisions have extended this duty to the consumer's employees, Rosebrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571 (1923), to other users of the chattel, Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 195 N.W. 388 (1923), and even to casual bystanders, McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W. 2d 122 (1927). This duty has been found in respect to such apparently innocuous items as a coffee urn, Hoenig v. Central Stamping Co., 273 N.Y. 485, 6 N.E. 2d 415 (1936), a cigarette, De Lape v. Liggett & Meyers Tobacco Co., 25 F. Supp. 1006 (Cal., 1939), aff'd 109 F. 2d 598 (C.C.A. 9th, 1940), or even animal food where there is a risk only to personal property, Ellis. v Lindmark, 177 Minn. 390, 225 N.W. 395 (1929).

[4] Factual cause between the negligence and the injury must be established, of course, but to qualify as the proximate cause much narrower limits have been set. The exact nature of the issues involved is among the most discussed questions in law. See Green, Rationale of Proximate Cause (1927); Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 103, 223, 303 (1911); Gregory, Proximate Cause in Negligence—A Retreat from Rationalization, 6 Univ. Chi. L. Rev. 36 (1938).

[5] In most cases only one of the two actors is before the courts, and thus the court is not required to give a complete answer to the problem. It is usually admitted that the conduct of the more remote actor would make him liable for the injury if it were not for the intervening factor,

actor is to be held not liable, the result is usually stated in terms of proximate cause, and the test is whether the intervening conduct created a new and unforeseeable hazard.[6] This is apparently what the court meant by saying that the intervening conduct was "independent," "efficient," and "not to be anticipated." The relevance of the "consciousness" of the intervening conduct is dubious; it is derived from a line of English cases involving mislabeled poisonous drugs in which the manufacturer's liability was held to be dependent on the lack of knowledge of the intervening vendor that the product was dangerous,[7] and it does not appear to have ever been accepted in this country in those terms. Although the intervening actor's knowledge or lack of it may have a bearing on his negligence in the absence of a duty of inspection, his mere negligence does not of itself relieve the manufacturer of liability, since there is always the possibility of their being joint tortfeasors or even that the intervening actor is not liable. In a number of cases in this country, however, the knowledge of the danger on the part of the intervening actor has been held to relieve the original actor of liability, apparently on the ground that it would not be foreseeable that a subsequent party with knowledge would perpetuate the danger.[8]

In the instant case there is no doubt that the salesman himself was negligent and that, if he had been injured in an accident resulting from the defect, his recovery from the manufacturer would have been barred by his assumption of the risk in refusing to install the safety catch.[9] From this the court concluded that any subsequent vendee should stand in the same position, and that therefore the present suit should be dismissed.[10] The assumption of risk is personal to the salesman, however, and it is difficult to see how he could assume the risk for subsequent vendees, much less for one outside of the chain of title such as the

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as it was in the instant case for the purpose of appeal, Ford Motor Co. v. Wagoner, 192 S.W. 2d 840, 842 (Tenn., 1946), yet it may or may not follow that if the original actor is granted immunity the subsequent party is liable.

[6] Prosser, Torts § 49 (1941); Harper, Torts 251–87 (1933).

[7] 1 Beven, Negligence 42 (4th ed., 1928). These cases are based upon the concept that the act of an intermediate party, while "unconscious" of the risk, is the act of the party setting the risk in motion; if the intermediate dispenser is "conscious" of the danger, and acts negligently in respect to it, he alone should be liable for any subsequent harm.

[8] Foster v. Ford Motor Co., 139 Wash. 341, 246 Pac. 945 (1926) (manufacturer had notified all purchasers of limitations in operation of tractor, where third party was injured); Stultz v. Benson Lumber Co., 6 Cal. 2d 688, 59 P. 2d 100 (1936) (plaintiff's employer knew of defective condition of scaffold plank supplied him by defendant). See 21 Minn. L. Rev. 220 (1936).

[9] Assumption of risk is based upon knowledge of the risk involved and the voluntary acceptance of it. Prosser, Torts § 51 (1941).

[10] This may be an over-simplification of the court's position. The statement of the court that "on the same grounds and for like reasons he became a 'conscious' agency, which, intervening, 'destroys, by his negligent act' of omission 'the causal connection between the first person concerned,' Ford Company, 'and the ultimate injury sustained' by the plaintiff herein," may mean that the salesman's act makes him liable, and that his assumption of risk means assumption of liability. Ford Motor Co. v. Wagoner, 192 S.W. 2d 840, 845 (Tenn., 1946).

guest driver who was the plaintiff in the instant case. From this point of view subsequent vendees and third parties are in much the same position as an innocent bystander would be if he were struck by the car when it went out of control.

The most persuasive reason for the result in the instant case is that following the original negligence the defendant manufacturer had undertaken to avoid its consequences by precautions which were probably as effective as possible within the range of economic feasibility, and that these precautions were frustrated in this case by the carelessness of a third party. As a general proposition, however, subsequent careful conduct cannot relieve a defendant of the consequences of his original negligence when harm has in fact resulted.[11] If a driver's attention has wandered from the road,[12] or if a landowner carelessly starts a fire on his premises,[13] they are held liable for resulting damage in spite of their subsequent efforts to avoid harm. In the instant case the intervening owner's negligence did no more than to frustrate the defendant's precautions with respect to this particular car; no new hazard was added to that foreseeable from the defendant's original negligence.[14] It might be concluded from this that the original negligence was still the proximate cause of the plaintiff's damage, and that the defendant manufacturer is still liable.

On the other hand it is arguable that if the intervening negligence is not foreseeable the risk is no longer that contained in the original negligence, and that therefore the defendant should be insulated from liability. This would be consistent with the cases which have held that knowledge on the part of the intervening actor relieves the original actor of liability,[15] if it be taken that it is unforeseeable that one with knowledge would not remove the danger. In the instant case, however, and in many other cases, to apply a test of "consciousness" uncritically produces a far from realistic view of foreseeability.[16] It may have been negligent for the salesman not to attach the auxiliary catch, but the defendant is not at liberty to assume that everyone will live up to the standard of the reasonable and prudent man when common observation shows that such is

[11] Rest., Torts § 437 (1934).

[12] Boni v. Goldstein, 276 Mass. 372, 177 N.E. 581 (1931).

[13] Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292 (1905).

[14] There are numerous cases holding that a defendant is still liable, in spite of any type of intervening force, if the ultimate injury is within the scope of the risk created by his original neglect. A striking illustration of this is found in Johnson v. Kosmos Portland Cement Co., 64 F. 2d 193 (C.C.A. 6th, 1933), where the defendant had negligently left a barge filled with an explosive mixture of gas, which was ignited by a stroke of lightning; although the lightning was unforeseeable, the resulting explosion was the foreseeable risk, and thus the defendant was held liable. See also Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 Pac. 53 (1925).

[15] Note 8 supra.

[16] A distinction may be drawn between consciousness of the fact that a poisonous drug is mislabeled and of the fact that a hood catch on a car is defective. The first will almost certainly cause serious harm if passed on, while the latter may or may not work and may or may not cause harm. Whether this distinction is of significance may be a matter of point of view, however.

not the case.[17] Since a more obvious danger would be more likely to be appreciated and remedied by one who knew of the facts which constituted it, the test of foreseeability as applied to cases of subsequent knowledge produces a queer result; the defendant is protected in cases of his more serious negligence and not in cases where others would be more likely to overlook the danger.

It might at first seem harsh to hold the manufacturer of an instrumentality responsible for all reasonably foreseeable consequences actually resulting from his original negligence in releasing a defective product from his control, in spite of subsequent precautions which were rendered ineffective through the carelessness of others, where the person injured is not himself at fault. It might seem absurd in a case where a manufacturer had gone to extreme lengths to remedy the defect, as for instance, by sending a high executive out to plead with the then owner, who still proved stubborn. Yet it must be remembered that the liability of the manufacturer is basically an enterprise liability; for instance, it must always be based on the negligence of an employee who is generally unknown and whose specific conduct is not in evidence.[18] Yet courts at times do not even mention the point and at times find no difficulty in applying res ipsa loquitur.[19] The fact is that it is practically impossible to manufacture articles without some defects creeping in and that this is a necessary incident of mass production. If dangers are to be released on consumers as a necessary result of our system of production it seems only fair that the enterprise should bear the losses resulting from them since it is best able to spread the cost among all consumers, rather than that the loss should be left on the innocent individual who had little reason to anticipate it. The requirement of foreseeability then remains, not so much for the reason that the enterprise might avoid the dangers in the first place, although that is still of some significance, but for the reason that by foreseeing inevitable harm to someone the enterprise is able to insure against it; and the concept of foreseeability becomes that of statistical foreseeability.[20]

Workmen's Compensation—Evidence—Settlement between Third-Party and Employee as Evidence of Negligence in Collateral Suit.—[Illinois].—An employee of the plaintiff construction company was killed while working on a railroad bridge repair project. The deceased's widow brought an action against

[17] "More and more the actual probability is becoming the controlling factor, and less and less attention is paid to what ought as distinguished from what is likely to be done." Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendees, 45 L.Q. Rev. 343, 365 (1929).

[18] The evidence of negligence offered in the instant case was merely that the hood catch was defective and that the defendant company had taken precautions to remedy it. Ford Motor Co. v. Wagoner, 192 S.W. 2d 840, 841 (Tenn., 1946).

[19] For the extent to which this doctrine is applied see Prosser, Torts § 43 (1941).

[20] For an excellent discussion of the relationship between enterprise liability and proximate cause, see Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case, 8 Univ. Chi. L. Rev. 729 (1941).