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Torts - Should a Plaintiff's Intervening Act Be an Absolute Defense under Comparative Negligence - Buckley v. Bell

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TORTS—Should a Plaintiff's Intervening Act Be An Absolute Defense Under Comparative Negligence? *Buckley v. Bell,* 703 P.2d 1089 (Wyo. 1985).

On September 2, 1981, Joseph Buckley ordered some regular gasoline from Bryce and Earl Bell, the owners of Johnie's, a petroleum dealership. Instead of delivering regular gasoline as requested, the Bells mistakenly delivered diesel fuel. Using a portable tank filled by the Bells, Buckley filled his gasoline engine hay baler with diesel fuel, believing it to be regular gasoline. Buckley started the baler and had driven it about one hundred feet when it started coughing and backfiring. Then the engine died. After discovering that the engine was filled with diesel fuel, he drove to Johnie's and informed the Bells of their misdelivery. The Bells' employees knew of their improper delivery and offered to replace the diesel fuel with regular gasoline.[1]

Buckley returned to his ranch, drained the diesel/gasoline mixture onto the ground and purged the engine by jumping the solenoid to pump the diesel fuel from the fuel line. He placed his hand over the carburetor to choke the engine and just as the gasoline started to flow from the fuel line, he removed his hand from the carburetor. At that moment, the engine backfired and the gasoline ignited. The diesel fuel on the ground then caught fire and the fire ultimately destroyed the hay baler.[2]

Buckley sued the Bells for damages to his hay baler and for costs incurred in contracting to harvest his hay.[3] In its decision in favor of the Bells, the Lincoln County District Court found that the Bells' act of selling the wrong fuel to Buckley did not proximately cause the fire that destroyed the baler. Buckley's acts were considered an efficient intervening cause which absolved the Bells from liability.[4] On appeal, the Wyoming Supreme Court affirmed the district court's decision, holding that there was an insufficient causal connection between the Bells' act of selling the wrong fuel to Buckley and the destruction of the hay baler.[5]

The *Buckley* decision presents a conflict between Wyoming's comparative negligence statute and the Wyoming Supreme Court's application of proximate cause where a plaintiff's intervening act provides an absolute defense to a defendant's original negligent act. This casenote will examine that conflict and discuss whether the traditional approach should be reconsidered in light of Wyoming's adoption of comparative negligence. Because Wyoming has adopted Wisconsin's comparative negligence stat-

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1. Brief for Appellant at 3, Buckley v. Bell, 703 P.2d 1089 (Wyo. 1985) [hereinafter Appellant's Brief].
2. *Id.* at 4.
3. *Id.* at 5.
4. Buckley v. Bell, 703 P.2d 1089, 1091 (Wyo. 1985).
5. *Id.* at 1095.

ute, the *Buckley* decision will be reexamined in a comparative negligence context, using Wisconsin's approach for guidance.[6]

BACKGROUND

General Standards of Proximate Cause

A determination of liability for a negligent act begins with the question of whether the act in fact caused the injury or damage. If the harm would not have occurred but for the act, the act is generally considered to be a "cause in fact" of the injury.[7] But the "cause in fact" test sweeps too broadly and its application would "set society on edge and fill the courts with endless litigation."[8] Consequently, the concept of proximate cause arose to place limits on a defendant's liability.[9] Although this determination adds confusion to the proximate cause concept, it is based on policy considerations requiring that the defendant be held liable only for conduct that is so closely connected to the injury that the law is justified in imposing liability.[10]

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6. WYO. STAT. § 1-1-109 (1977) provides:

> (a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.
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> (b) The court may, and when requested by any party shall:
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> (i) If a jury trial, direct the jury to find separate special verdicts;
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> (ii) If a trial before the court without jury, make special findings of fact, determining the amount of damages and the percentage of negligence attributable to each party. The court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering;
>
> (iii) Inform the jury of the consequences of its determination of the percentage of negligence.

See WIS. STAT. ANN. 331.045 (1931).

7. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CAL. L. REV. 229-230 n.1 (1932). This test is commonly known as the sine qua non or "but for" test.

8. W. PROSSER & W. KEETON, TORTS § 41, at 264 (5th ed. 1981) (quoting North v. Johnson, 58 Minn. 242, 59 N.W. 1012 (1894)).

9. W. PROSSER & W. KEETON, TORTS § 42, at 273 (5th ed. 1981) [hereinafter cited as PROSSER]. Defined literally, proximate means "near or immediate." When "proximate" is coupled with "cause," the term suggests an emphasis on physical or mechanical closeness. "Legal cause" or "responsible cause" might be more appropriate terms, as they do not imply proximity in time and space but rather imply liability for negligent acts. *Id.*

10. *Id.* § 41, at 264. The application of promixate cause has long been the subject of controversy in negligence law, the primary criticism being that it is too difficult to define and its meaning is not understood by jurors. 65 C.J.S. *Negligence* § 103, at 1128. According to Prosser, "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement or upon which the opinions are in such a welter of confusion." PROSSER, *supra* note 9, § 41, at 263. The confusion is not limited to disagreement among the states, but may exist within a single state as well. Prosser notes that only a few states have attempted to trace the path of their courts to determine if their decisions based on proximate cause are consistent. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 370 (1950). Although some commentators advocate an abolition of the proximate cause concept as a means for determining whether a defendant's negligent act should result in liability, the difficulty courts have in coming to an agreement regarding a standard definition for proximate cause appears to be an insufficient reason to discard its use. *See, e.g.*, Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471 (1950).

Some courts, including the Wyoming Supreme Court, have adopted what has been called the "traditional" definition of proximate cause.[11] In *Lemos v. Madden,*[12] the first Wyoming decision concerning proximate cause, the Supreme Court defined proximate cause as "that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."[13] In 1960, the court offered another definition for proximate cause in *Frazier v. Pokorny.*[14] In *Frazier,* the court held that a proximate cause is one which is the natural and probable consequence of one's actions.[15] An injury is considered to be natural and probable if looking back upon the act it appears to be reasonable, rather than extraordinary.[16]

Other courts find that an act is the proximate cause of the injury if it is a "substantial factor" in bringing about the harm.[17] Although often regarded as a test for cause in fact,[18] the substantial factor test has gained wide acceptance as a test for proximate cause as well.[19] The Wyoming Supreme Court has, on occasion, applied this rule.[20] For instance, in *McClennan v. Tottenhoff,*[21] a 1983 decision, the court quoted the New Jersey Supreme Court[22] which held that a tortfeasor is liable for injuries which his negligent conduct was a substantial factor in bringing about. Under this test, normal or foreseeable intervening causes do not relieve the tortfeasor of liability.[23]

The use of different tests for proximate cause makes uniform decisions difficult. In *Lemos v. Madden,* the majority observed that the ex-

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11. Gilliland v. Rhoads, 539 P.2d 1221, 1229 (Wyo. 1975).

12. 28 Wyo. 1, 200 P. 791 (1921).

13. *Id.* at 10, 200 P. 793. This definition is perhaps the most common definition of proximate cause. 65 C.J.S. *Negligence* § 103, at 1128.

14. 349 P.2d 324, 329 (Wyo. 1960).

15. *Id.*

16. *Id.*

17. 65 C.J.S. *Negligence* § 103 at 1157. The "substantial factor" test is incorporated in the RESTATEMENT (SECOND) OF TORTS § 431 (1965), and these rules for causation have been adopted in Wyoming. Buckley v. Bell, 703 P.2d 1089, 1094 (Wyo. 1985). RESTATEMENT (SECOND) OF TORTS § 431 (1965) provides:

> The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Under the Restatement rules for causation not only must the subsequent act intervene, but it must also supersede the original negligence. A superseding cause, according to RESTATEMENT (SECOND) OF TORTS § 440 (1965), "is an act by 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."

18. PROSSER, *supra* note 9, § 42, at 278.

19. *Id.* In fact, following the lead case of Anderson v. Minneapolis, St. P. & S.S.M.Ry. Co., 146 Minn. 430, 179 N.W. 45 (1920), the Restatement of Torts adopted the substantial factor test for proximate cause.

20. McClellan v. Tottenhoff, 666 P.2d 408, 414 (Wyo. 1983); Phelps v. Woodward Construction Co., 118 Wyo. 611, 204 P.2d 179 (1949).

21. 666 P.2d 408 (Wyo. 1983).

22. Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

23. *Id.* at 203, 156 A.2d at 9, *cited in McClellan,* 666 P.2d at 414.

istence of more than one test may result in different decisions in cases with similar facts.[24] But despite the confusion caused by the application of proximate cause, courts continue to use it to establish liability for effects to which a tortfeasor's wrongful act actually contributed.[25]

The Concept of Intervening Cause

When courts decide whether liability should be imposed on the defendant, two conflicting policy considerations arise. The first consideration is whether the defendant should be liable for harm that is the result of acts of independent origin. The second consideration is whether the defendant should be relieved of liability for acts that he has in fact caused.[26] In an effort to resolve this conflict, courts developed the concept of intervening cause.[27]

The meaning of intervening cause, like proximate cause, is generally easier to comprehend than it is to define. In essence an intervening cause is simply any cause that comes into active operation after the defendant's negligent act has been committed.[28] Generally, the intervening cause concept applies to subsequent acts by any intervening agency,[29] whether the agency is a third party, a natural phenomenon or the plaintiff himself.

The intervening cause issue has arisen in several Wyoming cases. In *Lemos v. Madden,*[30] a sheepherder tending his employer's sheep was left without heating fuel when a severe storm arose. The sheep wandered off, and with the storm still raging the next morning, he ventured after them. The herder was severely injured when he was forced to stay out all night in the bitter cold. He claimed that his injuries were proximately caused by his employer's failure to deliver the fuel, which ultimately required him to venture out in pursuit of the sheep.[31] The Wyoming Supreme Court held that the employer's failure to deliver heating fuel was not the proximate cause of the employee's injuries.[32] According to the court, venturing into the storm was an intervening act, rendering the original wrong a remote cause.[33] Since the injuries to the employee were improbable, the causal chain was broken and the employer was absolved from liability.[34]

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24. Lemos v. Madden, 28 Wyo. 1, 11, 200 P. 791, 794 (1921).
25. PROSSER, *supra* note 9, § 42, at 272.
26. *Id.* § 44, at 301.
27. *Id.*; RESTATEMENT (SECOND) OF TORTS § 441 (1965).
28. PROSSER, *supra* note 9, § 44, at 301.
29. To constitute an intervening act, an act must be committed after the defendant's original negligence and must create a new and independent force than the force originally created by the defendant. PROSSER, *supra* note 9, at 301-302.
30. 28 Wyo. 1, 200 P. 791 (1921).
31. *Id.*
32. *Id.*
33. *Id.* at 8, 200 P. at 793. According to the court in *Lemos,* a remote cause is an improbable cause. A proximate cause in contrast is a probable cause. *Id.* Generally, a remote cause is an independent cause that is not part of a natural succession of events leading to an injury. *See* BLACK'S LAW DICTIONARY 1164 (5th ed. 1979).
34. *Lemos,* 28 Wyo. at 8, 200 P. at 793.

The intervening cause concept arose again in *Kopriva v. Union Pacific Railroad Co.*[35] In *Kopriva*, a Union Pacific train struck and damaged an overpass bridge, thus necessitating the closure of one side of the divided highway. When the plaintiffs attempted to cross the bridge by way of the single remaining lane, they collided with another motorist and were seriously injured. The plaintiffs alleged that the railroad company's negligent act of damaging the bridge caused their injuries.[36] The court held that the act of the other motorist intervened and precluded recovery.[37]

The Wyoming Supreme Court overturned a well established state precedent[38] in *McClellan v. Tottenhoff*, when it imposed liability where a remote act caused injury.[39] In *McClellan*, a tavern owner sold alcohol to an underage purchaser. After drinking the alcohol, the minor struck another car with his automobile and killed the driver.[40] The court held that the acts of the minor drinking the alcohol and driving his car prior to the accident did not intervene.[41] Instead, the court determined that when the tavern owner sold the liquor to the minor, it was reasonably foreseeable that the minor would drink the liquor, become intoxicated, drive while intoxicated and injure or kill someone. Therefore, selling the alcohol to the minor was the proximate cause of the death. None of the acts subsequent to the liquor sale were unforeseeable and consequently the acts did not bar recovery. In what amounts to an extension of the *Lemos* rule, the court held that "the ultimate test concerning proximate cause will be whether the vendor could foresee injury to a third person."[42] If injury to a third person is foreseeable, then intervening acts will not bar recovery.

More recently, in *Robertson v. TWP, Inc.*,[43] the owners of property adjacent to a development area sued the development company when their homes were damaged by blowing dirt. In turn, the development company filed a third party suit against the seller of the development property. The seller's failure to provide adequate sewer facilities forced the municipality to deny a final plat to the development company, thereby halting construction and leaving loose dirt exposed to winter winds. The developer alleged that the seller's failure to provide the sewer service proximately caused the damages to the property owners' homes.[44] The court

35. 592 P.2d 711 (Wyo. 1979).
36. *Id.* at 712.
37. *Id.* at 713.
38. In Parsons v. Jow, 480 P.2d 396 (Wyo. 1971), the court held that tavern owners could not be held liable for injuries caused by their patrons. This ruling was reversed in McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).
39. McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983). Prior to *McClellan*, the court refused to impose liability on a tavern owner since the act of drinking the alcohol, and not the act of selling the alcohol, was considered to be the proximate cause of the injury. Parsons v. Jow, 480 P.2d 396 (Wyo. 1971).
40. *McClellan*, 666 P.2d at 408.
41. *Id.*
42. *Id.* at 414. An injury is foreseeable "if it is a probable consequence of the defendant's wrongful act or is a normal response to the stimulus of the situation created thereby." Buckley v. Bell, 703 P.2d 1089, 1092 (Wyo. 1985).
43. 656 P.2d 547 (Wyo. 1983).
44. *Id.* at 550-51.

held that the act of the developer in exposing the dirt to the wind was an intervening act and barred recovery. The court observed that "it would be difficult to conceive of a more clear example of an efficient intervening cause than that portrayed by the facts here."[45]

In *Lemos,* a case tried prior to Wyoming's adoption of comparative negligence, the plaintiff's intervening act barred recovery. In *McClellan, Robertson* and *Kopriva,* cases decided after the adoption of comparative negligence, a third party intervened and comparative negligence principles were not applied. When an intervening act is attributable to the plaintiffs conduct, however, comparative negligence principles become relevant.

Comparative Negligence in Wyoming

Prior to the adoption of comparative negligence, the doctrine of contributory negligence was under severe criticism. Many accident victims were either inadequately compensated or were not compensated at all, even when their contributory negligence was slight.[46] In an effort to alleviate the harshness of contributory negligence, Wyoming enacted what is known as the "equal to or greater than" rule for comparative negligence.[47] Under this rule when both the plaintiff and the defendant are negligent, their respective negligence is compared. If the plaintiff's negligence is greater than or equal to the negligence of the defendant, then he may not recover from the defendant. If, on the other hand, the plaintiff's negligence is less than that of the defendant, the damages are apportioned on the basis of the comparative fault attributable to each party.[48]

The Wyoming Supreme Court has retained the *Lemos* rule for proximate cause in situations in which the plaintiff does not contribute to his injuries.[49] In situations in which the plaintiff is negligent, and his conduct does not amount to an intervening cause, the court apportions fault. But when the court determines that the plaintiff's act intervenes, the application of traditional intervening cause concepts becomes uncertain. One commentator asserts that cases decided before comparative negligence, in which a "supervening" act by the plaintiff breaks the causal chain of the defendant's original negligent act, might be subject to reconsideration.[50] This reasoning is persuasive since comparative negligence allows courts to reach fair decisions by apportioning some of the blame to the defendant who committed the original wrong and some of the blame to the plaintiff or a third party whose act contributed to his injury.[51] Other

45. *Id.* at 551.

46. Heft & Heft, *Comparative Negligence: Wisconsin's Answer,* 55 ABA J. 127 (1969).

47. *See* WYO. STAT. § 1-1-109 (1977).

48. Comment, *Comparative Negligence Practice in Wyoming,* 18 LAND & WATER L. REV. 713, 715 (1983).

49. *Buckley* cited the *Lemos* rule for proximate cause. *Buckley,* 703 P.2d at 1091.

50. V. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 4.3, at 87-88 (1974 & Supp. 1981). A supervening cause is defined as "[a] new effective cause which, operating independently of anything else, becomes proximate cause of accident." BLACK'S LAW DICTIONARY 1290 (5th ed. 1979).

51. SCHWARTZ, *supra* note 50, § 4.3, at 87-88.

commentators believe that proximate cause theory will be unaffected.[52] How a particular state applies proximate cause under comparative negligence has largely become a question of public policy.[53]

Wyoming's previous decisions concerning proximate cause have the following in common: either the cases were decided before the adoption of comparative negligence[54] or, if decided after the adoption of comparative negligence, there was no apportionment issue.[55] The *Buckley* case presents the question of whether an intervening act by the plaintiff raises an issue of apportionment or whether traditional proximate cause concepts should be applied to completely bar recovery.

The Buckley v. Bell Decision

In *Buckley v. Bell,* the Wyoming Supreme Court held that the plaintiff's act constituted a complete bar to recovery. Although Mr. Buckley argued for a consideration of comparative negligence on appeal, the majority did not address the issue.[56] Instead, the court focused on the question of whether the Restatement test and Wyoming Supreme Court precedent[57] would yield the same result when applied to the facts of the case. Applying the *Lemos* and *McClellan* rules for proximate and intervening cause, the court held that since Buckley's acts intervened and were unforeseeable, the original negligence of the Bells was too far removed from the fire to impose liability.[58] To reconcile the *Lemos* and *McClellan* definitions, the court said that conduct is a substantial factor in bringing about the harm if the conduct causes injury "in natural and continuous sequence," and the sequence of events is "unbroken by a sufficient intervening cause."[59] Without discussing their reasoning, the court also found that the Restatement rules for proximate cause were applicable and the result under those rules would be the same.[60]

The dissent, on the other hand, refused to accept the premise that the Bells were in no way at fault for Buckley's damages.[61] According to Justices Rose and Cardine, Wyoming's comparative negligence rules pro-

52. Laugesen, *Colorado Comparative Negligence,* 48 DENVER L.J. 469, 486 (1972).

53. SCHWARTZ, *supra* note 50, § 4.2, at 85. *See supra* note 25.

54. Lemos v. Madden, 28 Wyo. 1, 200 P. 791 (1921).

55. McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983); Robertson v. TWP, Inc. 656 P.2d 547 (Wyo. 1983); Kopriva v. Union Pac. R.R. Co., 592 P.2d 711 (Wyo. 1979). In these cases, intervening acts were attributable to a third party, so there was no apportionment issue.

56. Appellant's Brief, *supra* note 1, at 14, 19. Although not raised as one of Buckley's issues on appeal, he argued that the *Lemos* rule should not be applicable under modern concepts of comparative negligence. Furthermore, Buckley argued that he should not have been completely precluded from recovery since comparative negligence could have been applied to limit his recovery.

57. The court looked to the following Wyoming cases concerning proximate cause: Robertson v. TWP, Inc., 656 P.2d 547 (Wyo. 1983); Kopriva v. Union Pac. R.R. Co., 592 P.2d 711 (Wyo. 1979); Connett v. Fremont Cty. Sch. Dist., 581 P.2d 1097 (Wyo. 1978); Gilliland v. Rhoads, 539 P.2d 1221 (Wyo. 1975); and Lemos v. Madden, 28 Wyo. 1, 200 P. 791 (1921).

58. *Buckley,* 703 P.2d at 1092.

59. *Id.*

60. *Id.* at 1092, 1094.

61. *Id.* at 1095 (Rose, J., dissenting); *Id.* at 1095 (Cardine, J., dissenting).

vided a simple solution to the problem by allowing the fact finder to determine the proportion of fault attributable to each party and to apportion the damages as necessary. Justice Cardine, advocating the abolition of intervening cause as an absolute defense to a defendant's original negligence, said:

> With the adoption of comparative negligence, old musty doctrines, replicas of the dinosaur age when contributory negligence—no matter how slight—was a complete defense, have been held no longer valid or appropriate. . . . I cannot agree that as a matter of law or fact appellee was not in any way at fault for this occurrence. I much prefer the simplicity of comparative negligence under which the fact finder simply determines the percentage of negligence of the respective parties rather than the confusion of old incomprehensible doctrines left over from a different era.[62]

In *Buckley,* the court's uncertainty concerning the application of comparative negligence is apparent. The opposing positions of the majority and the dissenters illustrate that Wyoming's traditional application of proximate cause, under which a plaintiff's intervening act always bars recovery, might be outdated in light of comparative negligence.

ANALYSIS

By refusing to reverse the trial court's decision and remand the case for a determination of proportional fault, the majority failed to adhere to the purposes of comparative negligence—to alleviate the harshness that results when a plaintiff negligently contributes to his own injuries. Prior to the dissenting opinions in *Buckley,* the Wyoming Supreme Court had not addressed the issue of whether an intervening act of the plaintiff should be compared with the negligence of the defendant for purposes of apportionment. Instead, the court continued to rely on the rule adopted in 1921 in *Lemos v. Madden,* or alternatively, applied a "substantial factor" test.[63]

In view of comparative negligence, the outcome in *Buckley* should have been different. In *Sherman v. Platte County,*[64] the court held that "[c]omparative negligence only abrogated absolute defenses involving the plaintiff's own negligence in bringing about his or her injuries."[65] A finding that the plaintiff's intervening act bars an originally negligent defendant from liability is an absolute defense. By precluding recovery where a plaintiff's act intervenes, the court is compromising the rules of comparative negligence. Such results are incompatible with the rules and policies of comparative negligence in Wyoming.

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62. *Id.* at 1095-96 (Cardine, J., dissenting).
63. McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).
64. 642 P.2d 787 (Wyo. 1982).
65. *Id.* at 790.

Wyoming cases decided after the adoption of comparative negligence demonstrate a clear trend toward the abolition of all absolute defenses for negligent acts where the plaintiff's act contributed to the injury. In direct response to the adoption of comparative negligence, the court in *Barnette v. Doyle*[66] disposed of the defense of contributory negligence. Likewise, in *Brittain v. Booth,* the court held that the defense of assumption of risk, since it has never been distinguished from contributory negligence in Wyoming, no longer provides an absolute defense.[67] In *Danculovich v. Brown,* the court eliminated last clear chance as an absolute defense.[68] The court in *O'Donnell v. City of Casper,*[69] held that the obvious danger rule is not an absolute defense to a plaintiff's negligence except in cases involving landowners and in ice and snow cases.[70]

Although an intervening act can be attributable to any agency, when the intervening act is attributable to the plaintiff, it is similar to other absolute defenses already abrogated by the Wyoming Supreme Court. Under the *Buckley* rule, a plaintiff's intervening act completely bars recovery as did contributory negligence, assumption of risk, last clear chance, and known and obvious danger prior to Wyoming's adoption of comparative negligence. As noted earlier, the purpose of comparative negligence is to eliminate the harshness which results when a plaintiff's own negligence operates to bar recovery.[71] This is as much the case when the plaintiff intervenes as when he assumes the risk, is contributorily negligent, fails to take the last clear chance or fails to avoid a known and obvious danger.

Comparison of the Wisconsin and Wyoming Approaches

In 1973, Wyoming adopted Wisconsin's comparative negligence statute verbatim.[72] Because the statutes are identical, and in light of Wisconsin's greater experience in dealing with comparative negligence, it is helpful to look to Wisconsin's application of the proximate cause concept in cases in which there is an issue of apportionment.[73]

In 1931, the year of Wisconsin's adoption of comparative negligence,[74] the Wisconsin Supreme Court decided the case of *Osborne v. Mont-*

66. 622 P.2d 1349 (Wyo. 1981).
67. Brittain v. Booth, 601 P.2d 532, 534 (Wyo. 1979).
68. Danculovich v. Brown, 593 P.2d 187, 194-95 (Wyo. 1979).
69. 696 P.2d 1278 (Wyo. 1985).
70. For further analysis of this case, see Note, *The Obvious Danger Rule—A Qualified Adoption of Secondary Assumption of Risk Analysis:* O'Donnell v. City of Casper, 21 LAND & WATER L. REV. 251, 259 (1986).
71. Barnette v. Doyle, 622 P.2d 1349 (Wyo. 1981).
72. *Id. See also* Woodward v. Haney, 564 P.2d 844 (Wyo. 1977).
73. Pre-1971 Wisconsin cases are helpful as interpretive aids to questions that arise in Wyoming, as Wyoming adopted Wisconsin's statute. *See* Mitchell v. Walters, 55 Wyo. 317, 100 P.2d 102 (1940), which held that in Wyoming, if an identical statute is adopted from another state that has a known and definite construction, it is presumed that Wyoming's courts will adopt the construction thus given. *See also* Comment, *Comparative Negligence in Wyoming,* 8 LAND & WATER L. REV. 597, 601 (1973).
74. WIS. STAT. ANN. § 331.045 (1931). Although amended in 1971, Wisconsin's post-1971 decisions are still applicable in Wyoming to the extent that the decisions do not revolve around the "49-50 percent distinction." *See* Comment, *supra* note 73, at 601.

gomery.[75] In *Osborne*, the court held that for a party to be found liable, his act must be a substantial factor in causing the plaintiff's injuries.[76] This holding is the basis for Wisconsin's test for proximate cause.[77] In the more recent case of *Blashaski v. Classified Risk Insurance Corp.*, the Wisconsin Supreme Court held that intervening causes are often considered to be substantial factors.[78] In situations in which there is more than one substantial factor contributing to the same result, the contribution of each factor is considered and its percentage of total cause is determined.

Apparently, the district court in *Buckley* found that the Bells' act was a substantial factor, and the majority did not dispute this. In addition, the district court did not find Buckley's act of draining the fuel uncommon.[79] District Court Judge John D. Troughton stated:

> I don't know how many times I've watched farmers and ranchers do exactly what Mr. Buckley has done and I don't know exactly how many times I've done what Mr. Buckley has done in this case. It's not, actually, uncommon. I can remember being out there in the hay field in my own experience, tearing the carburetor apart and trying to make it run and doing exactly what Mr. Buckley has done. So I know it's common.[80]

Having said this, the district court nonetheless found the Bells to be completely free from liability since Buckley's act was determined to have intervened.[81]

In Wisconsin, the fact finder would have been allowed to make a determination of each party's contribution. Under Wisconsin's rule for causation, an intervening force is not a defense where an original negligent act is determined to be a substantial factor in causing the resultant injury.[82] According to Wisconsin's reasoning,

> if the [defendant's] conduct or omission set in motion the forces which caused the damage, or was a substantial factor in causing the damage, the defense of intervening force is unavailing. If the trier of fact determines that defendant's conduct or omission was the dominant cause which put in motion the other forces, [defendant] is liable. . . .[83]

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75. 203 Wis. 223, 234 N.W. 372 (1931).

76. *Id.* at 242, 234 N.W. at 379.

77. HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL, § 7.155, at 31 (1978). *See* WISCONSIN JURY INSTRUCTIONS, § 1500, at 3.

78. Blashaski v. Classified Risk Insurance Corp., 48 Wis. 2d 169, 179 N.W.2d 924 (1970). *See* Campbell, *Duty, Fault, and Legal Cause*, 1938 WIS. L. REV. 402 for a discussion on Wisconsin's policy reasons for adopting the "substantial factor" test.

79. Appellant's Brief, *supra* note 1, at 5 (quoting transcript of the trial court's proceedings).

80. *Id.* RESTATEMENT (SECOND) OF TORTS § 447(c), at 478 (1965) states that an act is not superseding if it is "a normal consequence of a situation created by the actor's conduct. . . ."

81. *Buckley*, 703 P.2d at 1092.

82. Stewart v. Wulf, 85 Wis. 2d 461, 271 N.W.2d 79 (1977).

83. *Id.* at 475, 271 N.W.2d at 86 (quoting Schneider F. & S. Co. v. Thomas H. Bentley & Son, 26 Wis. 2d 549, 554, 133 N.W.2d 254, 257 (1965)).

Under Wisconsin law, if the original negligence is considered to be a substantial factor and the plaintiff's act intervenes, then a jury determines whether the intervening act supersedes the original negligence. For an intervening act to supersede the original negligence the act "must be such that the conscience of the court would be shocked if the first actor were not relieved from liability."[84] If it is not superseding, then the above Wisconsin decisions suggest that an intervening act is not an absolute bar, but is a basis for apportionment.[85] The superseding cause test simply provides the means to relieve the defendant from liability where it would be "wholly unreasonable" for policy reasons to hold him liable.

The situation in *Buckley* presents no policy reason why it would be "wholly unreasonable" for the Bells to answer in damages in proportion to their fault. Nor should it "shock the court's conscience" to hold the Bells' liable for their proportion of fault in causing Buckley's injuries. On the contrary, there are strong policy reasons for imposing proportional fault, especially in light of Judge Troughton's observation that Buckley's acts were not uncommon and in view of Wyoming's recent decisions abrogating absolute defenses involving a plaintiff's own negligence.

Apparently Wyoming has adopted the Restatement's requirement that to bar recovery, an intervening act must also be considered a superseding act. If Wyoming continues to apply the *Lemos* rule or the combined *Lemos/McClellan* rule developed in *Buckley,* intervening acts by the plaintiff that supersede the original negligence will always break the causal chain that must be unbroken for proximate cause to exist. Consequently, a plaintiff is completely barred from recovery, as was Mr. Buckley when he acted not uncommonly in his predicament. On the other hand, if the plaintiff's act is not superseding, the defendant carries the fault individually. Under the Wisconsin test, the rules of comparative negligence provide an equitable solution to the proximate cause problem by allowing a comparison of the relative negligence of each party. Adoption of this test will allow comparative negligence to work without interference from outdated doctrines like "intervening cause." The result will be a more equitable and easily applied rule for determining negligence in cases like *Buckley v. Bell,* in which both parties contribute to the same injury.

CONCLUSION

Since Wyoming's adoption of comparative negligence, it is apparent that the Wyoming Supreme Court strongly disfavors absolute defenses to a defendant's negligent acts in situations in which the plaintiff is also negligent. Under present Wyoming law, intervening acts by a plaintiff

84. *Stewart,* 85 Wis. 2d at 476, 271 N.W.2d at 86 (quoting Merlino v. Mutual Service Casualty Ins. Co., 23 Wis. 2d 571, 127 N.W.2d 741 (1964)).

85. *Stewart,* 85 Wis. 2d at 476, 271 N.W.2d at 86; Blashaski v. Classified Risk Insurance Corp., 48 Wis. 2d 169, 179 N.W.2d 924, 927 (1970); Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 376 (1931).

are an absolute bar to recovery. Such a harsh result is unnecessary when the rules of comparative negligence are employed.

If proportional liability is imposed when the defendant's act is a substantial factor, the purposes of proximate cause are satisfied by limiting liability to acts that are closely connected to the injury. Accordingly, a negligent plaintiff will not be completely barred from recovery when his intervening acts are found to be less negligent than the defendant's. Where there is a question of whether a plaintiff's wrongful act contributed to his injuries, whether the act be through contributory negligence, assumption of risk, last clear chance, an obvious danger[86] or an intervening act, the court should apply Wisconsin's test for causation. This test simplifies the determination of responsibility and allows the rules of comparative negligence to work fairly for both the plaintiff and the defendant.

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86. *See* Note, *supra* note 70.