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MAHESHWARI V. CITY OF NEW YORK
(decided May 6, 2004)

SCOTT GLOTZER

Discussing the role of duty, foreseeability, and proximate cause in negligence claims, Chief Judge Cardozo,¹ in *Palsgraf v. Long Island Railroad*, wrote:

The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or others within the range of apprehension. This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that they should have had notice of the particular method on which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye."²

Although the decision in *Palsgraf* ultimately hinged on the issue of duty,³ Cardozo's statement illustrates the interlocking nature of

1. Benjamin N. Cardozo was a judge for the New York Court of Appeals from 1914 to 1932, serving as Chief Judge beginning January 1, 1927. In 1932, Cardozo was appointed by President Herbert Hoover to the United States Supreme Court, succeeding Oliver Wendell Holmes.

2. 248 N.Y. 339, 344 (1928) (quoting *Munsey v. Webb*, 231 U.S. 150, 156 (1913); *Condran v. Park & Tilford*, 213 N.Y. 341, 345 (1915); *Robert v. U.S.E.F Corp.*, 240 N.Y. 474, 477 (1925)). Cardozo's observation that "risk imports relation" established a standard of negligence premised on the duty a defendant owes to a particular plaintiff. *Palsgraf*, 248 N.Y. at 341, 344. In contrast, the "substantial factor" test announced in Judge Andrews's dissent applies negligence liability if the negligent act was a substantial cause of the plaintiff's injuries. *Id.* at 354-56. The problem of unforeseeable plaintiffs to whom a duty may not be owed or the problem of intervening or superceding causes that may break the chain of causation between the original negligent act and the ultimate injury, play no role in considerations of negligence liability under the "substantial factor" test. *Id.* at 350. *Palsgraf* raised the question of the proper limits on liability for negligence and, in the words of one commentator, gave rise to "a tension in tort law about the proper balance between duty rules and proximate cause limits to circumscribe appropriately the scope of liability." RESTATEMENT (THIRD) OF TORTS § 29 cmt. f (Proposed Final Draft, No. 1, 2005).

3. *Palsgraf*, 248 N.Y. at 345-47. While issues of foreseeability, duty, and proximate cause are inextricably linked, duty, here the obligation to protect from injury, was not at

foreseeability and duty — duty arises only from foreseeable danger to a foreseeable plaintiff. However, Cardozo made clear that the particular causal mechanism of the injury need not be specifically foreseen if the possibility of the injury itself was a generally foreseeable consequence of the negligent conduct.⁴

In his *Palsgraf* dissent, Judge Andrews discussed the analytical limitations underlying the issues of foreseeability and proximate cause:

There is in truth little to guide us other than common sense. There are some hints that may help us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or by the exercise of prudent foresight could the result be foreseen?⁵

issue in *Maheshwari* as it was assumed that the City of New York had a duty to protect plaintiff under premises liability. *Maheshwari v. City of New York*, 2 N.Y.3d 288. See also *Premises Liability: Special Categories of Defendants*, in 2-8B PREMISES LIABILITY: LAW AND PRACTICE § 8B.05(3) (2004); *Premises Liability: Defenses*, in 2-8B PREMISES LIABILITY: LAW AND PRACTICE § 8B.06(3) 2004).

4. At least one commentator has suggested that the following formula should govern determinations of negligence:

[I]s the conduct of an ordinary prudent man based upon the dangers he should reasonably for-see to the plaintiff or one in his position in view of all of the circumstances of the case; not the particular hurt that actually befell the plaintiff, but the likelihood of some such harm as he suffered; and if the defendant fails to exercise the care that an ordinary prudent person should have exercised under the circumstances he is liable for the injuries plaintiff suffered as a result of such negligence. The circumstances include all the factors operative in the case commonly known as concurring or intervening agencies of third persons, animals and phenomena of nature.

D.E. Buckner, Annotation, *Comment Note: Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d 942 at §2(c) (1965) (quoting, Leon Green, *Proximate Cause in Texas Negligence Law IV*, 28 TEX. L. REV. 755, 776-77 (1950)).

5. *Palsgraf*, 248 N.Y. at 354 (Andrews, J., dissenting).

Judge Andrews noted that proximate cause was a judicial construct designed to limit liability.⁶ Similar to Cardozo's treatment of duty, Andrews also noted that assessments of proximate cause, like duty, were inextricably linked with assessments of foreseeability: "But the natural results of a negligent act — the results which a prudent man would or should foresee — do have a bearing upon the decision as to proximate cause."⁷

Judge Andrews went further, arguing that liability for negligence flowed from unlawful acts even if the resulting injuries were "unusual, unexpected, unforeseen and unforeseeable."⁸ While not regarding foreseeability in as expansive a manner as Andrews, the New York Pattern Jury Instructions define the relationship between foreseeability and actionable negligence in a similar manner:

Negligence requires both a reasonably foreseeable danger of injury to another and conduct that is unreasonable in proportion to that danger. A person is only responsible for the results of his or her conduct if the risk of injury is reasonably foreseeable. *The exact occurrence or exact injury does not have to be foreseeable*; but injury as a result of negligent conduct must be not merely possible, but be probable.⁹

Under both Judge Andrews's formulation and the Pattern Jury Instructions, foreseeability does not depend on precise injury-causing

6. *Id.* at 352. Judge Andrews wrote: "What we do mean by the word 'proximate' is that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Id.* at 352.

7. *Id.* at 355.

8. *Id.* at 351. The Second Restatement of Torts notes in a similar vein:

"Negligent conduct may result in unforeseeable harm to another, (1) because the actor neither knows nor should know of the situation upon which his negligence operates, or (2) because a second force the operation of which he had no reason to anticipate has been a contributing cause in bringing about the harm. In neither case does the unforeseeable nature of the event necessarily prevent the actor's liability."

RESTATEMENT (SECOND) OF TORTS § 435 cmt. a (1965).

9. NEW YORK PATTERN JURY INSTRUCTIONS — CIVIL, PJI 2:12 (Law. Co-op, 1996 Supplement) (emphasis added). See generally *Injury May Be Proximately Caused by Tortfeasor's Negligence*, in 1-2 WARREN'S NEGLIGENCE IN THE NEW YORK COURTS § 2.05(6) (2005); Buckner, *supra* note 3, at § 5(c); DAN DOBBS, THE LAW OF TORTS §§ 187-189, at 463-470 (2000).

events or precise plaintiffs to whom a duty is owed, but on more generalized risk factors. Under both formulations, the broader “type-of-harm” foreseeability standard, which encompasses general risk factors attending to negligent acts governed, as opposed to the more restrictive “mechanism-of-harm” standard, under which the precise causal factors of the injury must be foreseen for negligence to be found.¹⁰ Foreseeability also forms the crucial element in assessing the proximate cause of injuries resulting from intervening causes: “The key is foreseeability. When harmful consequences are brought about by a reasonably foreseeable independent force, there is no break in causation relieving the original actor from liability.”¹¹ Unforeseeable intervening causes, because they cannot be reasonably anticipated, sever the causal nexus between the original act and the harmful result.¹²

In *Maheshwari v. City of New York*, the New York Court of Appeals addressed the issues of foreseeability and proximate cause in the context of an alleged negligent failure by the City of New York and a private contractor to provide proper security at the Lollapalooza festival, held at Downing Stadium on Randall’s Island, where an assault occurred in one of the surrounding parking areas.¹³ The apparent tension noted earlier between foreseeability, nominally based on common sense assessments, and proximate

10. Prosser and Keeton explain these methods of assessing foreseeability as an element of negligence as follows:

In one sense, almost nothing is entirely unforeseeable, since there is a very slight mathematical chance, recognizable in advance, that even the most freakish accident which is possible will occur, particularly if it has ever happened in history before. In another, no event whatever is entirely foreseeable, since the exact details of a sequence never can be predicted with complete omniscience and accuracy. If one takes a very broad, type-of-harm perspective in describing both the “foreseeable risk” and the “result” of which the plaintiff is complaining, very likely the result will appear to be within the foreseeable risk. If, on the other hand, one takes a mechanism-of-harm perspective, it is easy to conclude that the result at issue is not within the foreseeable risk.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 297-98 (5th ed. 1984) (citations omitted).

11. *Injury May Be Proximately Caused by Tortfeasor’s Negligence*, in 1-2 WARREN’S NEGLIGENCE IN THE NEW YORK COURTS § 2.05(6) (2005).

12. *Id.* See also Buckner, *supra* note 3, at § 8.

13. 2 N.Y.3d 288 (2004).

cause, dependent upon judicially-created limits on liability that sometimes defy common sense, informs the decision in this case.¹⁴

In *Maheshwari*, the Court of Appeals affirmed the Appellate Division's reversal of the Supreme Court's order denying summary judgment to the defendants, a concert promoter, and the City of New York.¹⁵ The court issued three holdings. First, the court held that defendants were not liable for the attack because reasonable security measures had been taken to control the crowd and prevent disorderliness.¹⁶ Second, the court held that the attack on the plaintiff was not foreseeable as a matter of law given the circumstances.¹⁷ Third, the court held that even if the defendants had negligently failed to provide adequate security, such negligence was not a proximate cause of the plaintiff's injury because the unforeseen intervening criminal act severed the chain of causation between defendants' negligence and plaintiff's injuries.¹⁸

This decision lends itself to a reading that courts would find foreseeable those specific crimes common at prior concerts (e.g., disorderly conduct, misdemeanor assault, criminal mischief, resisting arrest, and possession of stolen property), but would not deem foreseeable the far more serious crime at issue here because it had not occurred at prior concerts.¹⁹ This conclusion goes against the weight of the established law on foreseeability and proximate cause – that neither the exact mechanism of an injury nor the exact injury itself need be specifically proven. All a plaintiff must demonstrate is that “the possibility of injury was foreseeable at the time of the defendant's negligence.”²⁰ If the potential for injury was foreseeable, “specific knowledge or notice of the particular way in which the accident occurred” is not required.²¹ *Maheshwari* reflects a reluctance to hold defendants liable for apparently unforeseeable intervening acts, but defines “unforeseeable” so

14. On the interactions between standards of negligence, proximate cause and foreseeability, see generally Buckner, *supra* note 3, *passim*.

15. *Maheshwari*, 2 N.Y.3d at 295.

16. *Id.* at 294.

17. *Id.* at 294-95.

18. *Id.* at 295.

19. *Id.* at 294.

20. *Injury May Be Proximately Caused by Tortfeasor's Negligence*, in 1-2 WARREN'S NEGLIGENCE IN THE NEW YORK COURTS § 2.05(5) (2005).

21. *Id.*

broadly that it includes acts within the same general category as those deemed foreseeable.²² This case comment contends that while the court properly applied, in a mechanical sense, the tort principles of foreseeability and proximate cause, its rigid application of these principles led to a result inconsistent with the established law on foreseeability. Some balance must be found between allowing liability in cases involving serious injury arising from the negligent failure to provide proper security, and drowning the municipality in a flood of tort litigation.²³ A more flexible approach to the same problem, based on the standard of “common contemporary experience,” was adopted by the Appellate Division, First Department, in *Rotz v. City of New York*.²⁴ This approach, essentially employing a common sense standard, would allow courts to consider the generalized risk factors underlying a specific prior history and draw more reasonable inferences regarding foreseeability and proximate cause than allowed by the rigid approach followed by the court in this case.

On July 10, 1996, the plaintiff, Ram Krishna Maheshwari, went to the Lollapalooza festival to distribute pamphlets on behalf of the International Society for Krishna Consciousness.²⁵ The concert was held at the city-owned Downing Stadium on Randall’s Island, but was sponsored by Delsener/Slater Enterprises (Delsener), a concert-promoter, by virtue of a “stadium-use agreement”²⁶ with the City.²⁷ The contract between the City and Delsener called for Delsener to provide all security inside and outside the stadium, includ-

22. The inconsistent nature of the court’s consideration of foreseeability in *Maheshwari* may stem from the different results dictated by the “type-of-harm” as opposed to the “mechanism-of-harm” standard for assessing negligence liability. See *supra* note 10. The court here appears to have used a “mechanism-of-harm” approach and found the attack on the plaintiff was not foreseeable as the mechanism of the plaintiff’s harm in *Maheshwari* had not specifically occurred at prior concerts. See *supra* note 9 and accompanying text.

23. On this issue, with specific reference to municipal liability, see Stewart F. Hancock, Jr., *Municipal Liability Through a Judge’s Eyes*, 44 SYRACUSE L. REV. 925 (1993); Horace B. Robertson, Jr., *Municipal Tort Liability: Special Duty Issues of Police, Fire, and Safety*, 44 SYRACUSE L. REV. 943 (1993).

24. 532 N.Y.S.2d 245, 248 (1st Dep’t 1988).

25. *Maheshwari*, 2 N.Y. 3d at 292. See also *Maheshwari v. City of New York*, 763 N.Y.S.2d 287, 289 (1st Dep’t 2002) (Saxe, J., dissenting).

26. *Id.* at 292.

27. *Id.* at 291; *Maheshwari*, 763 N.Y.S.2d at 289.

ing the parking areas.²⁸ However, at a meeting held to coordinate security for the concert attended by the City agencies responsible for the area (the Police Department and Parks Department) and Delsener, the City agreed to assume responsibility for security in the parking areas surrounding the stadium.²⁹

The plaintiff went to the concert to distribute pamphlets.³⁰ While he was in the Sunken Meadow parking area, he was attacked without provocation by four apparently drunk men.³¹ While other parking areas were patrolled by police officers, no officers patrolled the Sunken Meadow area at the time of the attack.³²

The plaintiff brought suit against the City and Delsener for negligent failure to provide adequate security. He alleged that criminal activity at prior Lollapalooza festivals placed defendants on notice with respect to this criminal activity, giving rise to a duty to provide adequate security. He also alleged that criminal activity at prior Lollapalooza festivals, along with the knowledge that concertgoers would be tailgating and consuming alcohol prior to the concert, as well as the violent nature of some of the acts billed for

28. *Id.* at 292. The contract provided that Delsener should “police the stadium and additional facilities, ensure the orderly entrance and exit of patrons, manage the parking and traffic flow, and safeguard the property.” *Id.*

29. *Id.* at 292.

30. *Id.* This area was described in the City’s Respondent’s Brief as “at least as large as two football fields,” and was located, according to Delsener’s Brief, about 100 meters from Downing Stadium. *See* Respondent-City’s Brief at 2, *Maheshwari v. City of New York*, 2 N.Y.3d 288 (2004) (No. 112014/97) (hereinafter City Brief); Brief for Defendant-Respondent (Delsener) at 3, *Maheshwari v. City of New York*, 2 N.Y.3d 288 (2004) (No. 112014/97) (hereinafter Delsener Brief).

31. *Maheshwari*, 2 N.Y.3d at 292. The plaintiff described his attackers as “heavily drunk, red eyes, bottles in their hand, smelling, smelling-heavily smelling.” Brief for Plaintiffs-Appellants at 27, *Maheshwari v. City of New York*, 2 N.Y.3d 288 (2004) (No. 112014/97) (hereinafter Plaintiffs Brief).

32. *Maheshwari*, 2 N.Y.3d at 292. In his deposition, the plaintiff testified that he saw no police officers or other security in the parking field, only uniformed members of the parking control staff. Plaintiffs Brief, *supra* note 31, at 28. A witness to the attack also testified that he saw no police officers patrolling the Sunken Meadow parking area “except for one person riding on a four-wheeler dirt bike who drive [sic] by about every half hour.” Plaintiffs Brief, *supra* note 31, at 28. He saw no other police except for the officers called to help the plaintiff after the attack, “until after midnight when he left the stadium.” Plaintiffs Brief, *supra* note 31, at 29. The Court of Appeals also noted that “[a]t a deposition, a police officer testified that, according to his ‘post list,’ no police officer had been assigned to the Sunken Meadow parking area.” *Maheshwari*, 2 N.Y.3d at 293.

the concert, increased the probability of criminal activity and made the attack against the plaintiff foreseeable. Lastly, the plaintiff alleged that defendants' failure to provide adequate security was the proximate cause of his injuries.³³ Delsener filed a motion for summary judgment, arguing that it owed no specific duty to prevent the random criminal assault against the plaintiff.³⁴ Delsener argued that its duty of care did not extend to the prevention of intervening third-party acts such as random and unforeseeable criminal assaults. Consequently, defendants' alleged failure to provide adequate security could not constitute the proximate cause of the attack against the plaintiff, as a matter of law, and therefore, defendants could not be held liable for plaintiff's injuries.³⁵

The trial court denied Delsener's motion for summary judgment.³⁶ Finding that Delsener had at least a general duty to provide security at the event where plaintiff was attacked, the court held that, given the attack, the plaintiff raised a triable issue of fact regarding the adequacy of that security.³⁷

The Appellate Division reversed and granted summary judgment to both Delsener and the City.³⁸ In reversing the Supreme Court, the Appellate Division relied on its earlier decision granting summary judgment to defendants on similar issues of foreseeability and proximate cause in *Florman v. City of New York*.³⁹ *Florman* involved an incident at the same Lollapalooza festival at issue in *Maheshwari*. In *Florman*, plaintiff was injured in a parking area when she was struck by a vehicle.⁴⁰ The *Florman* court noted:

33. *Maheshwari*, 2 N.Y.3d at 293-294. See Plaintiffs Brief, *supra* note 32, *passim*.

34. *Maheshwari*, 2 N.Y.3d at 293. See Delsener Brief, *supra* note 30, at 10-13.

35. *Maheshwari*, 2 N.Y.3d at 294. See Delsener Brief, *supra* note 30, at 13-16 and City Brief, *supra* note 30, at 25-40. Though only Delsener filed for summary judgment in the Supreme Court, both Delsener and the City were granted summary judgment in the Appellate Division's reversal of the Supreme Court's denial of Delsener's motion. *Maheshwari*, 2 N.Y. 3d at 293. Both the City and Delsener submitted respondents briefs to the Court of Appeals. *Id.*

36. *Maheshwari*, 2 N.Y.3d at 293.

37. See Plaintiffs Brief, *supra* note 31, at 8; City Brief, *supra* note 30, at 20-21.

38. See *Maheshwari*, 763 N.Y.S.2d 287.

39. *Id.* at 287-88 (citing *Florman v. City of New York*, 741 N.Y.S.2d 233 (1st Dep't 2002)).

40. *Florman*, 741 N.Y.S. 2d at 235. The incident occurred after a confrontation between the Plaintiff's companions, a scalper that had sold them counterfeit tickets,

It is difficult to understand what measures could have been undertaken to prevent plaintiff's injury except presumably to have had a security officer posted at the precise location where the incident took place or wherever pedestrians were gathered, surely an unreasonable burden. . . . Even then, it is doubtful that such a random act could have been prevented.⁴¹

Following this reasoning, the *Florman* court held that "plaintiff's injuries are the result of the independent intervening act of the driver of the vehicle that did not flow from any lack of security."⁴² The *Florman* court similarly held that the attack against the plaintiff was neither foreseeable in and of itself, nor a foreseeable consequence of any negligence on the part of the City (or Delsener), since the record showed that the criminal activity at prior Lollapalooza festivals involved the kind of quality-of-life crimes that arose as a consequence of crowd control at the concert.⁴³ Although "some forms of criminal activity might have been reasonably foreseeable in a gathering of this kind," the *Florman* court held: "that someone [driving], recklessly or intentionally, at high speed in a parking field striking standers-by is not a danger normally associated with crowd control."⁴⁴ Following *Florman*, the Appellate Division in *Maheshwari* held that the attack on the plaintiff was not foreseeable, and that defendants' alleged negligence could not have been the proximate cause of the plaintiff's injuries.⁴⁵

In his dissent, Judge Saxe challenged the majority's holding on both foreseeability and proximate cause.⁴⁶ Judge Saxe noted that in *Florman*, both Delsener and the City had a duty to protect those at the concert from foreseeable harm, "*including the criminal conduct of third parties.*"⁴⁷ Judge Saxe noted, however, that the duty to protect from foreseeable harm only arose when a party knew or had

and two other men; however, the identity of the driver of the vehicle that struck the plaintiff was never determined. *Id.* at 235.

41. 741 N.Y.S.2d at 239. See *Maheshwari*, 2 N.Y.3d at 295 (quoting the same point).

42. 741 N.Y.S.2d at 239.

43. *Id.* at 237.

44. *Id.* at 238.

45. 763 N.Y.S.2d at 288-89.

46. *Id.* at 290-92 (Saxe, J., dissenting).

47. *Id.* at 290 (quoting *Florman*, 741 N.Y.S.2d at 237) (emphasis added by citing opinion).

reason to know that third persons would endanger the safety of those lawfully on the premises.⁴⁸ Noting that the knowledge of such danger stemmed from “prior incidents of the same sort on the premises,”⁴⁹ Judge Saxe also cited “common contemporary experience”⁵⁰ as providing foresight into the possibility of criminal activity at the event in question. This notion of “common contemporary experience” formed the basis of the Appellate Division’s decision in *Rotz v. City of New York*.⁵¹ In *Rotz*, the plaintiff sustained a leg fracture at a free concert in Central Park when a commotion in the crowd led to a stampede in which the plaintiff was trampled.⁵² The plaintiff claimed that his injuries stemmed from the City’s failure to provide adequate crowd control.⁵³ Reversing an order of summary judgment for the City, the *Rotz* court found:

In light of common contemporary experience a jury could certainly find that, in the absence of adequate supervision and control of that crowd, it was reasonably foreseeable that disorder, unruliness, a melee or a riot could erupt from some cause ignited by the vagaries of myriad individuals “jammed together” in a heightened atmosphere.⁵⁴

Drawing on this concept, Judge Saxe’s dissent in *Maheshwari* argued that “common contemporary experience,” including the numbers expected for the concert, the nature of the concertgoers, the presence and availability of drugs and alcohol, and criminal activity at prior concerts, “would permit the prediction in this instance that the audience to be expected for this particular concert would contain a number of young men who could be expected to become intoxicated and engage in aggressive or violent behavior.”⁵⁵

48. *Id.* at 290 (quoting *Florman*, 741 N.Y.S.2d at 237).

49. *Id.* at 290 (citing *Florman*, 741 N.Y.S.2d at 237). The exact quote in *Florman* is: “as where the landlord [or permittee] is aware of prior criminal activity on the premises.” 741 N.Y.S.2d at 237.

50. *Maheshwari*, 763 N.Y.S.2d at 290 (Saxe, J., dissenting) (citing *Rotz v. City of New York*, 532 N.Y.S.2d 245, 248 (1st Dep’t 1988)).

51. 532 N.Y.S.2d 245 (1st Dep’t 1988).

52. *Id.* at 246.

53. *Id.*

54. *Id.* at 248.

55. *Maheshwari*, 763 N.Y.S.2d at 290. The number of people expected for the concert was 25,000, and the expected nature of the crowd was described in a deposition as

Noting the majority's statement that "*other* types of criminal activity might have been reasonably foreseeable, [but that] the type of attack that occurred here was unforeseeable,"⁵⁶ the dissent argued that the evidence and deposition testimony presented by the plaintiff, as well as crime statistics from prior Lollapalooza festivals, could support a finding that the specific type of criminal assault at issue in this case "*was actually foreseen.*"⁵⁷ Specifically, the dissent cited the testimony of the police official heading security for the concert, Captain Neil Spadaro.⁵⁸ Captain Spadaro testified that he had security concerns stemming from the potential for intoxication, fighting, illegal activities, and other dangerous behavior due to the large numbers of people expected, the nature of the acts and their fan base, and the presence of alcohol.⁵⁹ Given this evidence, the dissent noted that the possibility of an assault such as the one that occurred here, compared with the vehicular assault that occurred

a "moshing crowd of bare-chested, sweating, staggeringly drunk and stoned 'Beavis and Butt-Head' types." Plaintiffs Brief, *supra* note 31, at 11, 18.

56. *Maheshwari*, 763 N.Y.S.2d at 291. These other types of crimes were disorderly conduct, misdemeanor assault, and criminal mischief. *Id.*

57. *Id.* at 291 (emphasis in original).

58. *Id.*

59. *Id.* Captain Spadaro testified as follows:

Q: Why would the alcohol be an important concern in addressing security issues?

A: Because of the concern that some people might drink too much and get drunk.

Q: How does somebody getting drunk present a security concern?

A: Because, obviously, some people, can't get drunk without losing control.

Q: What does that mean?

A: Getting into fights maybe or being rowdy or engaging in behavior that they normally wouldn't engage in.

Q: Behavior that could be dangerous to others?

A: Yes.

In the same deposition, Captain Spadaro also testified:

In my experience as a police officer, when you get large crowds of young males together, there is a potential, especially with alcohol, there's a potential that, you know, some of them, which are a small minority, might engage in illegal activities.

And further:

I didn't want people hanging out for hours before a concert drinking or maybe just getting stupid and probably leading to fights or drunk driving car accidents. So we made it a point that those [parking] lots were going to be patrolled.

Plaintiffs Brief, *supra* note 31, at 13-15.

in *Florman*, was “on a different, and much higher, order of probability.”⁶⁰ The dissent argued from this analysis that summary judgment was not proper in this case as the plaintiff had raised sufficient questions of fact regarding the foreseeability of the assault.⁶¹

On the issue of proximate cause, the dissent argued that the *Florman* court’s fixation on the number of security officers present did not, by itself nor as a matter of law, necessarily imply that security at the event was adequate in manner of deployment, or sufficient in number, so as to defeat an allegation of negligence.⁶² The testimony of Captain Spadaro demonstrated that numbers did not prove competence. Spadaro conceded that the “Post List,” which detailed patrol assignments for the concert, revealed that no officers were assigned to patrol the Sunken Meadow area where the plaintiff was attacked.⁶³ The dissent further argued that regardless of the numbers of officers present, “the manner of their deployment could still have rendered security inadequate at the particular location in question.”⁶⁴ The dissent suggested that patrols at regular intervals, including the area where the plaintiff was attacked, may have prevented the attack. The dissent noted that the issue of the “intervening act [was] a normal or foreseeable consequence of the situation created by the defendant’s negligence,”⁶⁵ and was not a settled matter. Consequently, the dissent argued that contestable issues of fact about the criminal attack against Plaintiff and the arguable failure of the defendants to provide adequate security were sufficient to defeat a motion for summary judgment.⁶⁶

60. *Maheshwari*, 763 N.Y.S.2d at 291 (Saxe, J., dissenting).

61. *Id.*

62. *Id.*

63. *Id.* Captain Spadaro testified regarding the Post List:

Q: . . . Now, does that indicate that there was, to your knowledge, no post that covered the Sunken Meadow?

A: According to (R-1514-1516), I don’t see a post in the Sunken Meadow.

Q: If there was no post listed on the map, then to your understanding, there was no post assigned to that area, is that correct?

A: That’s my understanding.

Plaintiffs Brief, *supra* note 31, at 26.

64. *Maheshwari*, 763 N.Y.S.2d at 291.

65. *Id.* at 292 (quoting *Derdiarian v. Felix Constr. Co.*, 51 N.Y.2d 308, 315 (1980)).

66. *Id.*

The Court of Appeals rejected the “common contemporary experience” standard announced in *Rotz*.⁶⁷ The court held that *Rotz* and the instant case were factually distinguishable in that *Rotz* involved crowd control and *Maheshwari* involved a criminal assault, and “[a] random criminal attack of this nature is not a predictable result of the gathering of a large group of people.”⁶⁸ The Court of Appeals held that the assault on the plaintiff was “extraordinary under the circumstances, not foreseeable in the normal course of events.”⁶⁹ Finding that the attack on the plaintiff represented “an independent act far removed from defendants’ conduct,”⁷⁰ the court held that the intervening criminal assault broke the chain of causation and that any negligence by the defendants in failing to provide adequate security could not constitute a proximate cause of the plaintiff’s injury.⁷¹

While correctly applying the common law rule on intervening causes, particularly where the intervening cause is a criminal act,⁷² the court took too narrow a view of foreseeability by focusing solely on the specific crimes committed at prior Lollapalooza festivals.⁷³ The court, ignoring the larger context within which the assault on the plaintiff occurred and thereby limiting the scope of foreseeability and proximate cause, decided that liability would be assigned to defendants only for those specific crimes that had occurred at previous Lollapalooza festivals. Thus, the court would seemingly allow a suit for injuries stemming from the presumably foreseeable crime of misdemeanor assault to go forward, but would dismiss a suit for the far more serious crime of felonious assault for lack of a specific prior occurrence. This narrow focus fails to account for the far more permissive standards in the cases cited by the court in rendering its decision.

In *Florman*, relied on by both the Appellate Division majority and the Court of Appeals, the court noted that “it is not necessary to show the prior criminal conduct is of the same type or that it

67. *Id.* at 294-95; *Maheshwari*, 763 N.Y.S.2d at 288; *See Rotz*, 532 N.Y.S.2d at 248.

68. *Maheshwari*, 2 N.Y.3d at 294-95; *Maheshwari*, 763 N.Y.S.2d at 288.

69. *Maheshwari*, 2 N.Y.3d at 295 (quoting *Derdiarian*, 51 N.Y.2d at 315).

70. *Id.*

71. *Id.*

72. *See e.g.*, PROSSER AND KEETON, *supra* note 9, at § 44.

73. *Maheshwari*, 2 N.Y.3d at 293-94.

occurred in the same location.”⁷⁴ The Appellate Division dissent noted that the *Florman* court concluded that whether a particular criminal act at issue is unforeseeable is fact-specific.⁷⁵ *Florman*, consequently, is not an appropriate precedent given the facts of *Maheshwari*. The *Florman* court’s acknowledgement that a finding of foreseeability does not necessarily hinge on specific prior criminal acts is instructive to the extent that it highlights the court’s rigid application of foreseeability in *Maheshwari* and presents an alternative approach. Similarly, *Rotz*, relied on by the Appellate Division dissent, noted in an even more general manner, “[t]hat defendant could not anticipate the precise manner of the accident or the exact extent of the injuries, however, does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable.”⁷⁶

In contrast to the Court of Appeals and the Appellate Division majority, which focused more narrowly on specific prior incidents to gauge foreseeability and proximate cause, the Appellate Division dissent looked to the nature of the “general risk” presented by the criminal acts at prior Lollapalooza concerts and placed them in the larger context of the numbers of expected attendees, the nature of

74. *Florman*, 741 N.Y.S.2d at 233. This is provided, of course, that the criminal conduct was foreseeable. See *id.* at 238 (citing *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 292-94 (1993)). *Jacqueline S.* involved a rape in a public housing complex known for its criminal activity. *Id.* at 288. In *Jacqueline S.*, the Appellate Division granted summary judgment to the City, noting that the plaintiff’s allegations did not contain sufficient evidence of criminal activity in the specific building where the claimant resided. *Jacqueline S. v. New York*, 582 N.Y.S.2d 697, 698-99 (1st Dep’t 1992). The Court of Appeals reversed, stating that the City’s failure to provide any security precluded a summary judgment finding on the issue of foreseeability. *Jacqueline S.*, 81 N.Y.2d at 295. The Court of Appeals rejected the rule followed by the Appellate Division, which provided that “to establish the foreseeable danger from criminal activity necessary for liability, the operative proof must be limited to crimes actually occurring in the specific building where the attack took place.” *Id.* at 294 (referring to the Appellate Department decision and citing other sources). Rather, the Court of Appeals followed a more flexible rule: “[W]e cast foreseeability more generally — i.e., in terms of ‘past experience that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor.’” *Id.* at 294 (quoting *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519 (1980)).

75. Judge Saxe noted that in *Florman*, “virtually no level of security could have prevented the bizarre incident.” *Maheshwari*, 763 N.Y.S.2d at 291-92 (Saxe, J., dissenting).

76. *Rotz*, 532 N.Y.S.2d at 248-49 (quoting *Derdarian*, 51 N.Y.2d at 316-17) (emphasis in citing source).

the concert-goers, the presence of alcohol, and the lack of security in the area where the plaintiff was attacked. Drawing on “common contemporary experience,” given the totality of the surrounding circumstances, the dissent inferred a more expansive standard of foreseeability and proximate cause. Extrapolating the possible foreseeability of the attack on the plaintiff from the general experience of criminal conduct at prior concerts and recognizing at least the possibility that the lack of security in the area where the plaintiff was attacked could constitute proximate cause, the dissent’s approach allowed for a result more faithful to the prevailing standards of foreseeability and proximate cause than that permitted by the narrow approach followed by both the Court of Appeals and Appellate Division majority.⁷⁷

Instructive in this context is a similar case decided by the Appellate Court of Illinois, *Comastro v. Village of Rosemont*.⁷⁸ In *Comastro*, the plaintiff was assaulted in the parking lot of a municipally owned and operated arena after attending an AC/DC concert.⁷⁹ The municipality provided security for the concert, but had apparently redeployed security away from the parking area after the concert in order to patrol the immediate area of the arena while concertgoers were exiting.⁸⁰ Plaintiff alleged that the lack of adequate security formed the proximate cause of his injuries.⁸¹ Citing the lack of unruly behavior or fighting during the concert itself, the

77. See generally *Injury May Be Proximately Caused by Tortfeasor’s Negligence*, in 1-2 WARREN’S NEGLIGENCE IN THE NEW YORK COURTS § 2.05(6) (2005). In this vein, it is interesting to note that in addition to the attack on the plaintiff in this case, an attempted rape took place in the Sunken Meadow area, though it is not known chronologically which attack occurred first, which attack was reported first, or if the police knew of either one of the attacks when the other occurred. See Plaintiffs Brief, *supra* note 31, at 18-19. Though a search has revealed no lawsuit stemming from this incident, following the same reasoning in *Maheshwari*, one might expect the court to dismiss a suit against defendants for injuries resulting from the attempted rape.

78. 461 N.E.2d 616 (Ill. App. Ct. 1984). Focusing more on the “special duty” exception and the “proprietary function” exception to municipal immunity from tort liability, the *Comastro* decision has been questioned on those grounds. See *Calloway v. Kinkelaar*, 659 N.E.2d 1322, 1335 (Ill. 1995); *Repede v. Cmty. Unit Sch. Dist. No. 300*, 779 N.E.2d 372, 375 (Ill. App. Ct. 2002). However, the decision in *Comastro* has not been questioned on its foreseeability findings, the subject matter discussed in this case comment.

79. 461 N.E.2d at 618-19.

80. See *Id.* at 618, 620.

81. *Id.* at 618-19.

municipality contended that because it had no prior knowledge of possible criminal activity at the concert, the assault against the plaintiff was not foreseeable.⁸² While noting the importance of that information, the court held that it was not dispositive.⁸³ Based on testimony from the Deputy Chief of Police, the court noted that the municipality conducted research by contacting police officials in several locations that had hosted AC/DC concerts to ascertain specific security problems that arose as a result of an AC/DC concert.⁸⁴ The court found that the municipality had experienced such problems first-hand, as the band had performed at the same arena the previous year.⁸⁵ Relying on the same type of “common contemporary experience” informing the *Rotz* decision and the Appellate Division dissent in *Maheshwari*, the *Comastro* court found that because the municipality had advance warning of possible criminal conduct, it could be reasonably inferred that the attack on the plaintiff was foreseeable.⁸⁶ Whether a lack of adequate security was the proximate cause of the attack thus constituted a triable issue of fact sufficient to defeat a motion for summary judgment.⁸⁷

Applying the *Rotz* court’s and Appellate Division dissent’s standard of “common contemporary experience,” essentially a common sense standard, in assessing foreseeability and proximate cause may provide a means to avoid the legal tension stemming from their narrow and mechanical application. Such reviews would by necessity be fact-specific to each case. Plaintiffs would be required to show that the party responsible for security had at least a general knowledge of prior criminal activity at similar events and demonstrably failed to provide adequate security in the area where the attack occurred. Moving away from a rigid assessment of foreseeability from specific prior events to a more flexible approach based on “common contemporary experience,” and requiring a demonstrable link between the negligent behavior and the injury sustained, should work to prevent inconsistent results and allow

82. *Id.* at 620.

83. *Id.*

84. *Id.*

85. *Id.* at 620. The Deputy Police Chief testified: “[W]e learned pretty good. . . . The band attracts a rowdy type of — a very rowdy, drunks, drug users.” *Id.*

86. *Id.* at 620.

87. *Id.*

plaintiffs in analogous situations to the plaintiff in the instant case to recover for their injuries.

