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CAUSATION AND COMMON SENSE

JOHN SHERMAN MYERS*

Cloud rolls over cloud: one train of thought suggests and is driven away by another: theory after theory is spun out of the bowels of his brain . . . flitting in the idle air and glittering only in the ray of fancy.**

There is nothing more fundamental in the law than the premise that no man is liable for injury to another unless he has caused it. And it is equally true that no legal principle is easier to understand than this basic conception: if the defendant's act¹ has no connection with the harm suffered by the injured party, no liability, civil or criminal, will be placed upon the defendant for that harm. The defendant, say, admittedly has fired a gun, and an instant later a person within range is struck by a bullet—a sequence of events which creates a strong inference that the defendant has shot the injured person. But if it is proved that the bullet which brought about the injury could not have been fired from the defendant's weapon, the defendant's possible connection with the injury evaporates and he is in no way liable for it.² While there has been some minor controversy relative to the method of testing the connection of the defendant's act with the injury suffered,³ if the problem of legal cause involved no more than this question of actual causation, there would be no excuse for the complicated

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**HAZLITT, *THE PLAIN SPEAKER*, Bell Ed., 278 (1894).

1. Or, of course, his culpable failure to act. The difference, in connection with causation, is clearly described in Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 637 (1920). In this article, wherever an act is mentioned, the thought generally applies equally to a culpable failure to act.

2. Litigated cases supporting this proposition involve factual situations where the lack of connection between what the defendant did and the harm that was done is not so obvious as in the utterly simple case supposed in the text. Some of the clearer cases are: *Berryhill v. Nichols*, 171 Miss. 769, 158 So. 470 (1935) (negligent treatment by a physician of a wounded patient had no connection with the patient's death from a blood clot that the best treatment would not have prevented); *Lippold v. Kidd*, 126 Ore. 160, 269 Pac. 210 (1928) (negligent failure of an eye specialist to discover a splinter embedded in plaintiff's eye had no connection with the loss of the eye when it was shown that the eye would have been lost even though the splinter had been promptly discovered and removed); *Stacy v. Knickerbocker Ice Co.*, 84 Wis. 614, 54 N.W. 1091 (1893) (negligent failure to barricade a hole in the ice had no connection with the loss of a runaway horse which would not have been halted by a proper barrier, had one been erected). ". . . The collision would have occurred had the street car been standing still. . . ." *Tampa Electric Co. v. Jones*, 138 Fla. 746, 190 So. 26 (1939). Cases on this simple proposition are plentiful: *Hatch v. Smail*, 249 Wis. 183, 23 N.W.2d 460 (1946); *Dallas v. Diegal*, 184 Md. 372, 41 A.2d 161 (1945); *Hess v. Robinson*, 109 Utah 60, 163 P.2d 510 (1945); *Western & A. R.R. v. Frazier*, 66 Ga. App. 275, 18 S.E.2d 45 (1941).

3. The so-called "but for" rule (that the defendant's act is not in fact a cause of the injury if the injury would not have happened "but for" the act of the defendant) seems to be most often used by the courts, but it is inadequate to cover the case where the injury is the result of contemporaneous, although independent, acts of more than one actor, any one of which by itself would accomplish the injury. See *Kingston v. Chicago & N.W. Ry.*, 191 Wis. 610, 211, N.W. 913 (1927). In such a case, the "but

confusion that has developed and grown to such a degree that one eminent writer has said "the subject of legal cause as an element in liability for negligence has become a stench in the nostrils of Law Review editors"⁴—a rather broad statement and one which neither explains nor simplifies, although it does indicate the need for a reconsideration of the subject, if for no other purpose than to determine if it is really as bad, in an olfactory sense or otherwise, as it seems.

CAUSATION IN FACT: THE PROPER APPROACH

It is believed that one reason for the difficulties that the profession, from judge to first year law student, has experienced with legal cause rests in the fact that the proposition is usually expressed in the negative, as, for instance: "the defendant is liable only for the natural and probable consequences of his act," or that he "is not responsible for results that are remote and not proximate" and other similar phraseology⁵ pointed to the idea that defendant is not liable for injury to which he was a contributing factor unless the law affirmatively recognizes his connection with the injury as one which carries liability with it. This, and the use of poorly selected words to describe this liability-carrying connection, as well as the poor use of the words selected,⁶ have resulted in the lawyer approaching the problem from the wrong side: he seeks affirmative authority that the defendant's act was a "cause" of the kind to which liability attaches, attempting, as it were, to overcome some sort of a presumption or inference that, *prima facie*, defendant is not responsible in the eyes of the law for the harm his act brought

for" rule would produce the melancholy result that neither caused the injury since it would have happened anyway because of the other. See McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 153 (1925). A better test, now generally accepted, is that the defendant has caused the result if his act was a "substantial factor" in producing it. *Walton v. Blauert*, 256 Wis. 125, 40 N.W.2d 545 (1949); *Simon v. Hudson Coal Co.*, 350 Pa. 82, 38 A.2d 259 (1944); *Krauss v. Greenborg*, 137 F.2d 559 (3d Cir. 1943), *cert. denied* 320 U.S. 791, 64 S.Ct. 207 (1943); *Edgecomb v. Great A. & P. Tea Co.*, 127 Conn. 488, 18 A.2d 364 (1941); *Anderson v. Minneapolis, St. P. & S.S.M. Ry.*, 146 Minn. 430, 179 N.W. 45 (1920). See also *Restatement, Torts* § 431 (1934); *Peaslee, Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1128 (1934).

4. Scavey, *Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 383 (1939); 39 COL. L. REV. 1, 31 (1939); 48 YALE L. J. 371, 401 (1939). Prof. Scavey has imposed two unnecessary limitations: The odorous disturbance involves others than Law Review editors, who may be suspected of developing a certain tolerance; and the problem of legal cause is not restricted to negligence, but is an element in all legal liability. There may be significance in the fact that the index of the Harvard Law Review shows that in Volumes 1 through 47 (1887-1934) there appeared enough material on "Proximate Cause" to fill more than two solid pages of small type. In Volume 47 through Volume 61, No. 1, (November, 1950) there is but a single reference under "Proximate Cause",—hardly more than a passing mention contained in an article on recent developments in torts. See Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1228 (1937).

5. The variety is infinite; citation of authority is of neither value nor importance.

6. *I.e.*, "proximate cause," "legal cause," "natural and probable consequences," and many others. See: Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 115 *et seq.* (1911).

Courts have used the language of proximate cause when they mean the defendant was not negligent: *Jones v. City of Ft. Dodge*, 185 Iowa 600, 171 N.W. 16 (1919); when they mean that the plaintiff was not contributorily negligent: *Henry v. St. Louis*,

to the injured party, and unless there is something in the applicable principles that will overcome this "presumption," liability will not be imposed. It should be added that this attitude is often nourished by the very nature of the event in which the plaintiff was harmed. A border line case usually involves an accident that has happened through a remarkable coincidence of acts, timing, and physical conditions—so remarkable that the probability of anything resembling it occurring again is so remote as to be virtually nil.⁷ In such a set of freak circumstances, involving a defendant who intended no harm of this kind, the psychological reluctance of the court, even if unadmitted, to pin responsibility on the negligent, although not evil minded, actor,⁸ must be very real. This reluctance should be recognized as a partial explanation for a court subconsciously⁹ approaching a hard case as one where no liability should be imposed unless the rules affirmatively so require.

The proper approach to a problem in causation is this: the defendant is *prima facie* liable for all injury that his act has been a substantial factor in producing; *unless* there is some rule which limits that *prima facie* liability, the defendant will be required to atone, civilly or criminally, for the harm that he has thus caused. In other words, admitting *causation in fact* the defendant is liable unless there is some rule applicable to his case which limits that liability.¹⁰

As noted above, the basic rule that in the absence of causation in fact the defendant is not liable, is relatively simple. And if the converse were true—that if there is causation in fact the defendant is liable—there would be no difficulty with the problem at all. We know, of course, that this converse rule is not true. It is believed, however, that this converse rule is sufficiently close to the truth to warrant saying that it is true *unless*, and to approach the problem from the viewpoint of the "unless"—to examine the authoritative rules *limiting* the liability of the defendant for injury with which his act was sufficiently closely connected to have been a substantial

K. C. & N. Ry., 76 Mo. 288, 43 Am. Rep. 762 (1882); when they mean there was no causation in fact: DeMoss v. Kansas City Rys., 296 Mo. 526, 246 S.W. 566 (1922); when they mean that plaintiff failed to mitigate his damages: Weeks v. Great Northern Ry., 43 N.D. 426, 175 N.W. 726 (1919). This "jargon" also has been used to explain holdings that there will be no recovery in certain cases of mental disturbance: Victorian Rys. Comm'rs v. Coultas, L.R. 13 A.C. 222 (1888); Ward v. West Jersey & S. R.R., 65 N.J.L. 383, 47 Atl. 561 (1900). See Throckman, *Damages for Fright*, 34 HARV. L. REV. 260, 268 (1921).

7. For example, see the astonishing facts in Wood v. Pennsylvania R.R., 177 Pa. 306, 35 Atl. 699 (1896). And then compare, as to facts and as to result, but *not* as to reasoning, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

8. There is less reluctance to pin liability for unexpected results on an intentional, as distinguished from a negligent wrong-doer: "It is generally agreed that results intended by an actor are proximate if they, in fact, take place." McLaughlin, *supra* note 3, at 151. See also: Peaslee, *supra* note 3; Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 470 (1933). See RESTATEMENT, TORTS § 501 (1934).

9. And sometimes consciously. See, for example, Cardozo, in H.R. Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928).

10. This was a premise of Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 103-4 (1911). It appears again in RESTATEMENT, TORTS § 431 (1934).

factor in bringing it about. In so doing, we emphasize not so much rules that establish liability, but those that save the defendant from the consequences that he, *in fact*, has caused.

It must be noted at the start that there are several instances of limitation of the defendant's liability that have nothing whatever to do with the problem of so-called legal cause. In negligence cases, for instance, it is elementary that a successful action requires that plaintiff establish four elements, each of which is as essential as the other, and all of which are equally essential if the plaintiff is to prevail. These, in brief, are as follows:¹¹

- (a) a duty owed by the defendant to the plaintiff to use reasonable care to avoid injury to the plaintiff;
- (b) a failure of the defendant to live up to the duty so imposed—a failure to use due care under the circumstances;
- (c) a causal connection—that defendant's act, in fact as well as legally, caused plaintiff's injury;
- (d) real, and not nominal, damage to plaintiff.

Since each of the above is an essential element, the lack of which bars recovery, it follows in every instance where liability is not imposed on defendant for the results that, in fact, he has caused, there is a limitation of his liability. There is nothing novel about such limitation of liability in the absence of a duty,¹² or in the absence of a violation of duty,¹³ or in the absence of actual damage,¹⁴ or in the absence of causation in fact.¹⁵ With this in mind, we can approach on a firmer foundation the question of further limitations of liability based upon the law of legal cause—limitations of liability in those cases where there was a duty which was violated, and where such violation in fact was a substantial factor in producing actual damages. Are there any such limitations? And if so, what are they?

11. PROSSER, TORTS 177 (1941); *cf.* GREEN, RATIONALE OF PROXIMATE CAUSE 2 (1927); RESTATEMENT, TORTS § 281 (1934).

12. Where there was a failure to use due care which caused actual damage to plaintiff, but *no duty* owed by the defendant to the plaintiff, defendant is not liable: *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

13. Where there was a duty owed by the defendant to the plaintiff, and an act of the defendant which caused actual damage to the plaintiff, but where the act was *not negligent*, defendant was not liable: *Vaughn v. Menlove*, 3 Bing. 468 (N.C. 1837), and the hundreds of similar applications of the so-called standard of care.

14. Where there was a failure to use due care in violation of a duty owed by defendant to plaintiff which caused the result of which plaintiff complains, but *no actual damage* to plaintiff, defendant is not liable: *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402 (1941); *Sullivan v. Old Colony St. Ry.*, 200 Mass. 303, 86 N.E. 511 (1908).

15. Where the defendant's act was negligent and in violation of a duty owed to plaintiff, and plaintiff suffered actual damage, but there was *no causation in fact*, defendant is not liable: Cases cited note 2 *supra*, and the related text.

An analysis of the ways in which causation in fact may take place¹⁶—the ways in which an act becomes a substantial factor in bringing about injury—indicates that there are only two main classifications, which, for convenience, may be termed direct causation and indirect causation. Direct causation consists of those situations where the force created by the defendant's act¹⁷ itself comes into contact with the plaintiff or his property, or where the defendant's act started into motion another force which brings about the result. Indirect causation consists of those situations where the defendant's force comes to rest before the damage is done to the plaintiff, but in a position where it brings about a situation of increased danger to the plaintiff, and, acting on the stage thus set, a new and independent force intervenes and becomes the direct cause of the injury.

DIRECT CAUSATION

Cases where the causation is direct are readily identifiable for the most part, as where the immediate result of the defendant's act is the injury complained of;¹⁸ where there is a direct transmission of the defendant's force—as the jolt felt in the rear car of a train when the engine is coupled onto the front;¹⁹ where the defendant's force aggravates an existing physical condition peculiar to the plaintiff—as a latent disease;²⁰ where the defendant's force operates in connection with already operating forces—as the wind or tide;²¹ and where the defendant's force instigates the operation of a new force which immediately causes the result—as the development of a septic condition as an aftermath of a wound resulting from the defendant's act.²² One other class of cases is worth mentioning in this connection: where the act of the defendant arouses action on the part of an animal or a human being, and it is the latter force that brings about the plaintiff's injury. Beale classified all such instances as cases of direct causation,²³ but it would seem

16. I have found no better analysis of the ways, physical, metaphysical, and philosophical, in which causes operate to produce results than in Beale, *supra* note 1. For a criticism of Beale's views, see Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 211 (1924). And see McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925). I have derived my analysis of the kinds of causal connections primarily from these three articles.

17. Or, in cases of culpable failure to act, the force that the defendant was obligated to stem or divert.

18. *Hitaffer v. Argonne Co.*, 183 F.2d 811, 815 (D.C. Cir. 1950); *Thompson v. Lupone*, 135 Conn. 263, 62 A.2d 861 (1948).

19. *Mathews v. Kansas City Rys.*, 104 Kan. 92, 178 Pac. 252 (1919); *Hill v. Winsor*, 188 Mass. 251 (1875); *cf. Scott v. Shepherd*, 2 W. Bl. 892 (1773). *Contra: Wood v. Pennsylvania R.R.*, *supra* note 7. *Palsgraf v. Long Island R.R.*, *supra* note 7 *semble*, in which see particularly the dissenting opinion of Judge Andrews, 248 N.Y. at 347, 162 N.E. at 101.

20. *Hahn v. Delaware, L. & W. R.R.*, 92 N.J.L. 277, 105 Atl. 459 (1918); *Watson v. Rheinderknecht*, 82 Minn. 235, 84 N.W. 798 (1901).

21. *Romney March v. Trinity House*, L.R. 5 Ex. 204 (1870). Wind can also be a later factor, taking effect after defendant's act: *Harverly v. State Line & S. R.R.*, 135 Pa. 50, 19 Atl. 1013 (1890).

22. *Clarke v. New Amsterdam Cas. Co.*, 180 Cal. 76, 179 Pac. 195 (1919); *Armstrong v. Montgomery St. Ry.*, 123 Ala. 233, 26 So. 349 (1899).

23. Beale, *supra* note 1, at 646.

that this would depend on the "rationality" of the act—its voluntary nature, as opposed to its being an instinctive reaction.²⁴ Under this view, where the action stimulated is that of an irrational animal,²⁵ or the instinctive reaction of a human being,²⁶ it should be regarded as a force created directly by the act of the defendant, but where the act aroused is voluntary, in the sense that the actor could exercise a choice, it is a case of indirect causation, to be decided according to the principles applicable to that kind of a situation.²⁷

In these cases of direct causation the vast majority of courts impose liability on the defendant for the plaintiff's injury, and have no difficulty whatever with the fact that in many of these situations the end result of which plaintiff complains was not only unforeseen, but actually was unforeseeable. Thus in the famous *Polemis* case,²⁸ a plank was negligently dropped into the hold of a ship and caused a spark which ignited gasoline vapors. The fact finder concluded ". . . that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated."²⁹ In holding for the plaintiff, the court emphasized: "But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act. . . . Once the act is negligent, the fact that its exact operation was not foreseen is immaterial."³⁰ Cases abound where the causation is direct in the sense used above, and the defendants have been held respon-

24. McLaughlin, *supra* note 16, at 167.

25. In *Loftin v. McGrainie*, 47 So.2d 298 (Fla. 1950), steers being transported escaped, and no effort was made to retake some of them until the next morning. Actions of defendant's servants again terrified one steer, and he stampeded and injured plaintiff, a bystander. In sustaining defendant's liability, the court said (47 So.2d at 302): "No intervening cause is sufficient unless it is independent and not set in motion by the original wrongful act." See also *City of Fort Worth v. Patterson*, 196 S.W. 251 (Tex. Civ. App. 1917); *Illinois Cent. R.R. v. Siler*, 229 Ill. 390, 82 N.E. 362 (1907); *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585 (1898); *McDonald v. Snelling*, 14 Allen (Mass.) 290 (1867).

26. In *Rich v. Finley*, 89 N.E.2d 213 (Mass. 1949), plaintiff was instructing a student flyer when defendant dove his plane at the plaintiff's plane. The student "froze" to the controls, and the plane crashed. The student's act was not an intervening cause, but "one link in the chain" from the defendant's act to the end result. See also *Bass v. Seaboard Air Line R.R.*, 205 Ga. 458, 53 S.E.2d 895 (1949); *Hill v. Wilson*, 224 S.W. 2d 797 (Ark. 1949); *Hubble v. Brown*, 84 N.E.2d 891 (Ind. 1949); *New York, C. & L. R.R. v. Affolder*, 174 F.2d 486 (8th Cir. 1949); *Jefferson Hospital v. Van Lear*, 186 Va. 74, 41 S.E.2d 441, 444 (1947); *Hatch v. Smail*, 249 Wis. 183, 23 N.W.2d 460 (1946); *Lentz v. Carolina Scenic Coach Lines*, 208 S.C. 278, 38 S.E.2d 11 (1946); *Duff v. Bemidji Motor Serv. Co.*, 210 Minn. 456, 299 N.W. 196 (1941); *Ogden v. Aspinwall*, 220 Mass. 100, 107 N.E. 448 (1915); *Scott v. Shepherd*, *supra* note 19.

27. See note 54, *infra*, and the related text.

28. *In re Arbitration between Polemis and Another and Furness, Withy & Co.*, [1921] 3 K.B. 560.

29. *Id.* at 563.

30. *Id.* at 577.

sible for results that are completely unexpected and unanticipated.³¹ In many instances these courts emphasize, as did Lord Scrutton in the *Polemis* case, the immateriality of the lack of foreseeability.³² Indeed, the unanimity of the judicial application of this principle was so great twenty or thirty years ago that isolated contradictions were regarded simply as wrongly decided.³³ Today, there are more instances of apparent contradictions, many of which, however, can be fitted into the over-all picture on other reasoning.³⁴ But in 1920, the proposition was simply this: in cases where there is causation in fact, and there is a direct and immediate consequence, the great weight of authority and the better view is that there are no limitations in the law of causation that will exempt the defendant from liability.

Today that relatively simple proposition in the law of legal cause requires re-examination in only one respect: Is it so, as Beale contended,³⁵ that apart from the consequences of the defendant's own force so long as it continues active,³⁶ defendant also is responsible for the consequences of another force created by his force, which second force was the direct cause

31. *Watson v. Rheinderknecht*, 82 Minn. 235, 84 N.W. 798 (1901) (where the severity of the injury was greatly increased because of a prior war injury of which plaintiff had been suffering long prior to the battery on him by this defendant); *Thompson v. Lupone*, 135 Conn. 236, 62 A.2d 861 (1948) (where plaintiff's over-weight and nervousness accounted for an extension of the normal recovery period from the negligent injury caused by the defendant from two weeks to eight months); *State v. O'Brien*, 81 Iowa 88, 46 N.W. 752 (1890) (where the person assaulted by the defendant had heart disease and died of fright). See also *Kilduff v. Kalinowski*, 136 Conn. 405, 71 A.2d 593 (1950); *Ethridge v. Nicholson*, 80 Ga. App. 693, 57 S.E.2d 231 (1950); *Barabe v. Duhrkop Oven Co.*, 231 Mass. 466, 121 N.E. 415 (1919).

32. In addition to the cases cited in note 31 *supra*, see *Hitaffer v. Argonne Co.*, *supra* note 18; *Rich v. Finley*, *supra* note 26; *Johnston v. City of East Moline*, 405 Ill. 460, 91 N.E.2d 401 (1950); *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 90 N.E.2d 859 (1950); *Straight v. B. F. Goodrich Co.*, 354 Pa. 391, 47 A.2d 605 (1946); *Crowe v. McBride*, 25 Cal.2d 318, 153 P.2d 727 (1944); *Du Pont de Nemours & Co.*, 146 F.2d 765 (6th Cir. 1944); *Derosier v. New Eng. Tel. & Tel. Co.*, 81 N.H. 451, 130 Atl. 451 (1925); *Washington, A. & Mt. V. Ry. v. Luckens*, 32 App. D.C. 442 (1909); *Illinois Cent. R.R. Co. v. Siler*, *supra* note 25; *Hill v. Windsor*, *supra* note 18.

33. *Wood v. Pennsylvania R.R.*, *supra* note 7, where the defendant's negligently operated train struck a woman at a grade crossing and hurled her body against the plaintiff waiting at a nearby station,—“Plaintiff's injury was a consequence so remote that defendant could not reasonably foresee it.” See 177 Pa. at 312, 35 Atl. at 701. See also the strikingly similar facts in the *Palsgraf* case, *supra* note 7, where, in a divided court, the plaintiff was also denied recovery, but the court was unanimous that the legal cause point was clear for the plaintiff, the decision turning on the absence of duty.

Beale thought the *Wood* case did not follow the accepted doctrine and was inconsistent with an earlier Pennsylvania case, *Bunting v. Hogsett*, 139 Pa. 363, 21 Atl. 31 (1891). See Beale, *supra* note 1, at 650. Another inconsistent case, *Hogan v. Bragg*, 41 N.D. 203, 170 N.W. 324 (1918), was disposed of by Beale saying “This was a decision by the notorious Robinson, J.,” and later adds “Comment is unnecessary.” See Beale, *supra* note 1, at 648.

The necessity for foreseeability of result in cases of direct causation was generally regarded as unsound even before Beale's article: 1 BEVEN, *NEGLIGENCE* 88 (3d ed. 1908); 1 STREET, *FOUNDATIONS OF LEGAL LIABILITY* 111 (1906). See also Bohlen, *The Probable or the Natural Consequences as the Test of Liability in Negligence*, 40 Am. L. Reg. (N.S.) 79, 159 (1901).

34. *Infra* note 66, and related text.

35. Beale, *supra* note 1, at 658.

36. The modern cases on this phase, cited in notes 31 and 32 *supra*, seem fully to support this aspect of Beale's conclusions of 1920.

of the result? And for the results of a third force which was created by the second force which was created by the defendant's force, and so on, world without end? We know from common experience that one force can activate a third, and that the chain of force on force could progress unbroken into what is, for all practical purposes, infinity. Judge Andrews, ably arguing his dissent in the *Palsgraf* case,³⁷ supposed the case of the car driver who negligently collides with a car loaded with dynamite (although he did not know it) and an explosion follows. A, walking on the nearby sidewalk is killed. B, sitting near a window in an opposite building, is cut by flying glass. C, likewise sitting by a window, but a block away, is similarly injured. Ten blocks away a nursemaid, startled by the noise, involuntarily drops a baby, D, to the sidewalk. Andrews had no doubt as to the ability of A and B to recover, and little doubt as to C. But as to D, he felt clearly otherwise: "We will all agree that the baby might not."³⁸ Perhaps so, and it is not difficult to agree, yet if we assume the action of the nursemaid to be involuntary, then the fall of the baby is the result of a force created by the driver's force, for which, under Beale's view, the driver would be responsible.³⁹

There must be obviously some point along the chain of direct causation, in the sense of one force activating another, where the idea of liability is repugnant to one's conception of basic justice. It would appear that this point should be at the weakest link in the chain,—the point at which there is no probable relation between a given force and the force next preceding it in the series of events.⁴⁰

37. *Supra* note 7, 248 N.Y. at 353, 162 N.E. at 104 (1928).

38. See 248 N.Y. at 353, 162 N.E. at 104. McLaughlin, *supra* note 16, at 175, note 80, carries the chain of force directly creating force nearly to the ultimate: X, desiring to frighten A, a nervous and excitable person, comes behind A and says "Boo!" A happens to be combing his hair with a metal comb and starts violently, giving himself a slight abrasion of the scalp. He immediately tries to put witch hazel on the wound, but in his excitement grabs a similar bottle containing an acid and puts it on his head. This so aggravates his pain that he seizes the first cloth at hand, a red flannel undergarment, and takes a short cut to the doctor. The red cloth attracts a bull who butts A into a barbed wire fence. Gangrene appeared in the wounds thus produced of which A dies. Is X liable for the death?

One cannot refrain from calling to mind an ancient "Joe Miller": "My father called an employee into his office and fired him. The employee got mad and picked up an ink-well and threw it at my father's head. My father ducked, and the ink-well went through the plate glass window into the street, and spilled ink on a lady's mink coat. She went to the curb to shake off the ink, and it frightened a horse pulling a load of expensive china, and the horse ran away and all the china was broken, and the horse ended up in an antique store window and all kinds of rare pictures were torn to pieces. And now everybody is suing my father for dodging the ink well."

39. *Supra* note 26, and the related text.

40. See McLaughlin, *supra* note 16, at 169 *et seq.* See *Engle v. Director General of Railroads*, 78 Ind. App. 547, 133 N.E. 138 (1921), where defendant's negligently run train hit an automobile and threw it against a switch. The switch opened, the train ran onto a siding and crashed into boxcars, injuring the plaintiff, a passenger. The court said that the circumstances were so unusual and improbable that there was no liability.

In *Cone v. Inter-County Tel. & Tel. Co.*, 40 So.2d 148 (Fla. 1949), the defendant's negligently driven car collided with a gasoline truck, which ignited. Flames burned plaintiff's telephone lines, interrupting service, and plaintiff's repairman was sent to the

This limitation on the liability of the defendant who is at the starting point of a series of cause on direct cause is treated in the Restatement of Torts⁴¹ in this manner: Look back *after the event*, from the harm complained of to defendant's original negligent act, and determine whether or not it is "highly extraordinary" that the negligent act should have brought about this effect. If it is highly extraordinary that this should have happened, then, although there is in fact direct causation, the act of the defendant will not be the legal cause of the injury. We thus have a limitation in the law of causation on the liability of the defendant for harm to which his act in fact was a substantial contributing factor.

The difficulty with the application of this limitation to any given set of facts is, according to the Restatement,⁴² that it is impossible to state definite rules to determine whether a particular result of a force directly created by the defendant's wrong is so highly extraordinary to prevent the act from being a legal cause, because it is a matter for the judgment of the court, formulated after the event, and therefore with knowledge of the effect that actually was produced. This difficulty, if difficulty it is, seems more theoretical than real, and, if it were left to the judgment of the jury, rather than the court, as a matter of factual determination, would present no more difficulties than many other applications of legal principles of a general nature to the circumstances of a particular case.⁴³

scene. When he reached the vicinity, the gas truck was still burning, and he moved in for a closer view. When he was still about 300 feet away, the truck exploded and he was injured. The telephone company and its insurer sue for his injuries. The court indicated that the defendant was liable for the damage to the gasoline truck and its contents, for injury to the driver, for damage to the lines, but not for the injury to the repairman. It would seem that the act of the telephone company in sending a repairman to the scene of an accident which interrupts service, and the movement of the repairman to the scene might be regarded as "involuntary,"—the company "reacting" to the interruption of service, and the repairman obeying orders, both steeped in the tradition of the telephone industry that service must be restored with minimum interruption. If it were not for the act of the repairman in venturing closer when he saw that repairs were not then feasible, the case would be a neat example of highly extraordinary results from direct cause on direct cause. Nevertheless, the remarks of the court are well worth noting: "The responsibility of a tortfeasor for the consequences of his negligent act must end somewhere, and under our legal system the liability of the wrongdoer is extended only to the reasonable and probable, not merely the possible, results of a dereliction of duty." See 40 So.2d at 150.

41. RESTATEMENT, TORTS § 435 (1934), and the corresponding section in the 1948 Supplement to the Restatement.

42. 1948 Supp. to RESTATEMENT, TORTS § 435, comment *e*. See also McLaughlin, *supra* note 16, at 170, where he evidences the same difficulty with his "appreciably probable" test.

43. See *Derosier v. New England Tel. & Tel. Co.*, *supra* note 32. See also, Jayne, J.S.C., dissenting in *Stewart v. Norton*, 75 A.2d 900, 903 (N.J.L. 1950). Consider the necessity for the jury to determine, as a matter of fact, whether the defendant exercised the kind and amount of care that the ordinary prudent man would exercise under the same circumstances in order to reach a conclusion as to whether the defendant was negligent. Consider also the task of the jury in determining whether, in a criminal case, a "reasonable doubt" exists. See Shumaker and Longsdorf, *CYCLOPEDIA LAW DICTIONARY* 936 (3d ed. Moore, 1940), or any standard law dictionary, to appreciate the difficulties of definition, in spite of which the application of the principles by a jury works well in actual practice.

The Law abounds with similar analogies.

It has not been over-looked, nor can it be ignored, that there is a considerable segment of legal pedagogy that takes the position that this question of the limitation of liability for highly extraordinary results directly caused is not really a question of causation at all. They think the problem, strictly speaking, concerns the determination of whether the *duty* imposed on the actor is designed to protect the one harmed from the risk of injury from the hazard which the defendant's wrong created.⁴⁴ Indeed, the reporter of the 1948 Supplement to the Restatement of Torts⁴⁵ seems apologetic for discussing the matter under "Causal Relation" at all,⁴⁶ and does so only because the courts "frequently treat such problems as problems of causation."⁴⁷

This may be all very well for those writers and courts who agree that the acceptance of the "risk theory" is a recognition of "the true nature of the problem."⁴⁸ It happens that this writer is not one who has joined in the acceptance of this proposition, largely because of an inability to agree with the result or the reasoning of the majority in the *Palsgraf case*,⁴⁹ which seems to be the springboard from which the risk theorists dove into the treacherous waters of the hazard approach.⁵⁰ For the realist who recognizes that courts do decide these cases from the viewpoint of causation, and that

44. RESTATEMENT, TORTS § 281 (1934) and 1948 Supp. § 281, comment *ee*, and § 435, comment *c*.

45. Laurence H. Eldredge.

46. 1948 Supp. to RESTATEMENT, TORTS § 281, comment *ee* (dealing with the duty owed by the defendant to the plaintiff): "A completely accurate analysis of the hazard element in negligence would require the material on superseding cause in Chapter 16 to be placed in this chapter."

47. 1948 Supp. to RESTATEMENT, TORTS § 435, comment *c*.

48. 1948 Supp. to RESTATEMENT, TORTS § 281, comment *ee*.

49. *Supra* note 7. *As to results*: Plaintiff was injured by the fall of a scale on defendant's railroad station platform, toppled over as a direct result of the negligence of defendant's servants in assisting another prospective passenger to board a moving train, causing him to drop an innocent looking package, which in fact was explosive and did explode, rocking the platform and overturning the scale. The majority denied recovery on the basis that there was no duty owed to this plaintiff which had been violated! Accepting the principle of law applied (that an essential element in the plaintiff's case in a negligence action is a violation of a duty owed to the plaintiff,—*supra* note 7, and related text), to conclude in this situation that there was no such duty is almost inconceivable. *As to reasoning*: The only thing that seems clearly expressed in the majority opinion is the statement of the elementary principle that a duty to plaintiff must exist, and that, if there was no duty, the "... law of causation, remote or proximate, is thus foreign to the case before us."

It is significant, it is submitted, that the *Palsgraf* case received considerable criticism at and shortly after it was first decided: 29 COL. L. REV. 53 (1929); 24 ILL. L. REV. 325 (1929); 27 YALE L. J. 1002 (1928); see also Green, *The Duty Problem in Negligence Cases*, 28 Col. L. Rev. 1014 (1928). Cf. Goodheart, *Unforeseeable Consequences Of An Act*, 39 YALE L. J. 449, 465 (1930). It seems ironic that when the *Palsgraf* case was decided, it was not commented upon in the Harvard Law Review's valuable "Recent Cases" section.

50. Seavey, *Cardozo and the Law of Torts*, *supra* note 4. *But cf.* GREEN, RATIONALE OF PROXIMATE CAUSE V-VII (1927), written and published prior to the *Palsgraf* decision. See further, Note, *Impact of the Risk Theory on the Law of Negligence*, 63 HARV. L. REV. 671 (1950). See, in general on the risk theory, Goodheart, *supra*, note 49 at 465 (1930); Wright, *The Law of Torts: 1923-1947*, 26 CAN. B. REV. 40, 60 (1948).

the risk theory is receiving but slow judicial acceptance,⁵¹ the causation approach is there. It exists. It must be argued to the courts, applied by practitioners, taught in the schools and grasped by the students. It must, in short, be faced. The way to face it is to accept the fact that the majority of the courts still utilize the causation approach and that there has evolved a limitation on the basic idea that a wrongdoer is responsible for the direct consequences of his act by exempting him from such liability when the actual result, looked at from an after-the-event pinnacle, was in fact so highly extraordinary that basic justice requires such a limitation.

INDIRECT CAUSATION

Contrasted with cases involving direct causation are those factual situations regarded as indirect causation,—where the defendant's act is a substantial factor in bringing about the result of which plaintiff complains, and where the other elements essential to his case appear,⁵² but where the force set in motion by the defendant does not itself come into direct contact with the plaintiff or his property, and does not directly create, or set in motion, a force which does. Nevertheless, although spent itself, the defendant's wrong creates a situation from which there is an increased danger of injury of some kind. Acting on the stage thus wrongfully set by the defendant, a new and independent force intervenes, and it is the new force that is the direct cause of the result, made possible only by the previously active, but now spent, force of the defendant. This situation is nicely illustrated by the well known case of *Gilman v. Noyes*,⁵³ where the defendant negligently left down the bars of a fence on plaintiff's land, and certain sheep for which the plaintiff was responsible wandered off and were lost,—apparently destroyed by bears. It will be observed that there was no act of the defendant that stirred the sheep into action, and that he did nothing to induce the gastronomical activities of the bears. On the contrary, once he had left the bars down his activities ceased, and everything that happened subsequently was due to the roving ovine spirit, or the predatory ursal instincts, or both. But assuming that the defendant's act was over and done, and his wrongful force was spent, what was the result as things then stood? Obviously, an increased hazard to the sheep—new dangers—new risks. Because of defendant's wrong, a new range of theretofore improbable events became possible: the sheep, as sheep will, were likely to roam; wild animals known to be in the locality might now invade the sheepcote, undeterred by a barrier; roving sheep tend to expose themselves to dangers appropriate to the area,—in the wilder country to a fall over a cliff, to be lost in the brush, to injury from climatic changes, to harm from eating poisonous vegetation, and in more settled areas to such things as traffic on the public roads, and on the railroads, or theft. The list

51. See note, 63 HARV. L. REV. *supra* note 50, at 672, where it is conceded that the risk theory "has received but slow judicial approval since the *Palsgraf* case."

52. *Supra* note 11, and the related text.

53. 57 N.H. 627 (1876).

is limited only by the imagination, and yet each of these possibilities possesses a degree of probability somewhere within the range between the certain and the impossible,—it is impossible, for instance, that the sheep will be killed by ferocious field mice, but is certain that some fleece will be lost by catching on low-hanging branches. Whatever the probability of the thing that happened, the likelihood that it would happen was, in fact, increased by the defendant's act; he was a substantial factor in producing the end result. Defendant is a cause of the injury. Does it follow that he will be liable for anything that may be happen?

The doctrine seems generally well settled: the defendant will not be legally responsible for injury resulting from all intervening forces, but only some of them: those forces that come within the scope of the increased risk that the defendant has created. This is determined by applying to the specific intervening force that directly caused the end result⁵⁴ the test of whether it was, or reasonably should have been, anticipated or foreseen by the defendant whose wrongful act set the stage. The determination of the defendant's liability on causation principles in these situations depends upon exactly this: if the intervening force, whatever it was, was reasonably foreseeable, the defendant is liable;⁵⁵ if it was not, he is not liable.⁵⁶ The determination of what was the nature of the intervening force that directly caused the injury, and whether that force was foreseeable, are questions of fact, to be handled exactly as any other factual determination.⁵⁷

54. It is apparent that cases of indirect causation involve one phase of the problem of multiple cause, which is somewhat beyond the scope of this article. See, for a good discussion, Peaslee, *supra* note 3. In such a case the intervening force is the direct cause which operates on the situation created by the defendant's act. Such intervening force could be a natural force, as the extraordinary flood in *Cole v. Shell Petroleum Co.*, 149 Kan. 25, 86 P.2d 740 (1939), or the normal storm in *Derry v. Flitner*, 118 Mass. 131 (1875); as non-culpable human agency, as the act of a person who attempts to save his property placed in danger by the defendant's negligence in *Illinois Central R.R. v. Siler*, *supra* note 25; a negligent human agency as the negligent driver who injured the plaintiff forced into the street to avoid defendant's unlawful obstruction of the sidewalk in *O'Neill v. City of Fort Jervis*, 253 N.Y. 423, 171 N.E. 694 (1930); or a criminal human agency, as the act of the thief who entered the window negligently left open by the defendant in *Stansbie v. Troman*, [1948] 2 K.B. 48. To the extent that the intervening force is culpable, liability is imposed upon the wrongful creator of that force according to the principles of direct causation discussed in this article. This liability, however, is apart from the question of the liability of the defendant whose wrongful act has made the harmful effect of the intervening force more probable in the indirect causation situation now under consideration.

55. *Northern Ind. Transit Co. v. Burk*, 89 N.E.2d 905 (Ind. 1949); *Maletovsky v. Harshaw Chem. Co.*, 360 Pa. 279, 61 A.2d 846 (1948); *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 195 P.2d 783 (1948); *Cunrtis v. Jacobson*, 54 A.2d 520 (Me. 1947); *Bronk v. Devenny*, 25 Wash.2d 443, 171 P.2d 237 (1946); *Zatkin v. Katz*, 126 Conn. 445, 11 A.2d 843 (1940); *Byerly v. Thorpe*, 221 Wis. 28, 265 N.W. 76 (1936); *Brauer v. New York Central & H. R.R.*, 91 N.J.L. 190, 103 Atl. 166 (1918); *Benedict Pineapple Co. v. Atlantic Coast Line R.R.*, 55 Fla. 514, 40 So. 732 (1908); *Gilman v. Noyes*, *supra* note 53; *Derry v. Flitner*, *supra* note 54.

56. *Central Flying Service v. Crigger*, 221 S.W.2d 45 (Ark. 1949); *Waugh v. Suburban Club Ginger Ale Co.*, 167 F.2d 758 (D.C. Cir. 1948); *Sexton v. Noll Constr. Co.*, 108 S.C. 516, 95 S.E. 129 (1918); *Miller v. Bahmmuller*, 124 App. Div. 588, 108 N.Y. Supp. 924 (2d Dep't 1908).

57. In *Gilman v. Noyes*, *supra* note 53, the court indicated that the following ques-

In one way, it is unfortunate that the profession did not adopt for common use in connection with the intervening force in indirect causation some word other than "foreseeable," or else adopt some other word to express the anticipation of harm element in the determination of the defendant's negligence, for which "foreseeable" is also used.⁵⁸ The two questions, as a result of this similarity of terminology, are easily confused. For instance, in *Blyth v. Birmingham Water Works*,⁵⁹ the valves installed by the defendant in its waterpipes failed to operate during an unprecedented frost. The case properly turned on the finding that the defendant was not negligent in installing valves that failed to operate under such unforeseeable conditions, but a less astute court⁶⁰ might have reached the same result by following the reasoning of legal cause. If the question of the wrongful nature of the defendant's act were disregarded, or even if it were assumed that the act was wrongful, the relation of the act of installing the valves to the damage was that of indirect cause,—the intervening force which was the direct cause being the freeze, which, since it was unprecedented in severity, was not foreseeable, and the defendant will not be held liable for such results, even though it was a substantial factor in producing them. Nevertheless, there is a substantial difference in the nature of the foreseeability in these two applications of the foreseeability concept.⁶¹

In the determination of whether the defendant's act was negligent (assuming a duty owed by the defendant to the plaintiff to do such act with

tions should have been submitted to the jury: a) were the sheep eaten by bears, and, if so, b) was this a foreseeable danger?

58. To determine whether, in fact, the defendant, when he acted, was exercising the kind and amount of care that the ordinary prudent man would use under the same circumstance (see PROSSER, *Torts* 224 [1941]) necessarily requires an appraisal by the fact-finder of the danger or risk involved. If it is real enough for it to be deemed foreseeable to the reasonable man, then the defendant was negligent in failing to take the necessary precautions to guard against it. This is elementary in the law of negligence. See *Louisville and N. R.R. v. Finley*, 237 Ala. 116, 185 So. 904 (1939); *Vaillancourt v. Manchester Gas Co.*, 88 N.H. 95, 184 Atl. 353 (1936); *Delair v. McAdoo*, 324 Pa. 392, 188 Atl. 181 (1936); *Sullivan v. Creed, Ir. R.* [1904] 2 K.B. 317. See also: HOLMES, *THE COMMON LAW* 144 (1881); Seavey, *Negligence—Subjective or Objective*, 41 HARV. L. REV. 1, 5 (1927).

59. 11 Ex. 781 (1856).

60. One who may be suffering from "... a confusion of ideas and of the thoughtless repetition of a familiar phrase without the intellectual exertion required to ascertain its meaning and the limits of its application." See Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 271 (1921).

In *Sprigall v. Fredericksburg Hospital and Clinic*, 225 S.W.2d 232 (Tex. Civ. App. 1949), plaintiff was injured by slipping on defendant's waxed floor. In arguing that the wax was not the proximate cause of the injury, the court obviously was arguing that defendant had not been negligent. See *infra* note 81, and the related text. In GREEN, *RATIONALE OF PROBABLE CAUSE* 83 *et seq.* (1927), there are numerous examples of judicial lapses of this nature.

61. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1229 (1937): "It is noteworthy that this test (the foreseeability of the intervening force in cases of indirect causation) is in words substantially that which determines whether a particular act or omission is to be regarded as ... negligent toward the particular plaintiff who had been injured by it. There is, however, a difference in the degree and character of the foreseeability which is required in the two cases, a difference so great as to amount to a difference in kind." See also: Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 223, 242 (1911).

due care), the question of foreseeability is directed to harm in general to the plaintiff, and not to the particular harm that may actually have occurred.⁶² In applying the foreseeability test to the intervening force in cases of indirect causation, it is the force that actually intervened that must have been reasonably foreseen, and not merely an injurious force in general,—it is what did happen, not what might have happened. The defendant who leaves a loaded gun in a place where it might be accidentally discharged by some unauthorized person is quite clearly negligent in so doing, since some injury from the discharge of the gun might reasonably be foreseen, but whether this negligence is the legal cause of the injury of a plaintiff wounded by the discharge of the gun will depend upon the nature of the intervening agency that brings about the discharge. The defendant's negligence is an actual indirect cause of plaintiff's injury in any event, but it will be a legal cause only if the actual direct cause was or should have been foreseeable. Thus, if the gun should fall, or be knocked over, and be discharged, or if a small boy should play with it and fire it, the defendant will be liable for the injury,⁶³ but if an escaping criminal, whose presence in the neighborhood is unsuspected, should pick it up and wound a pursuer who is attempting to prevent his escape, the unforeseeability of such an intervening act would enable the defendant to escape liability.⁶⁴

It should be observed at this point, that the foreseeable intervening force which directly causes the injury in a situation involving, as to the defendant, indirect causation, possibly could produce a "highly extraordinary" result. If the foreseeable intervening force is a culpable force, we have already established that the actor who wrongfully set it in motion is not legally responsible for such unusual results.⁶⁵ It follows that the defendant whose wrongful act increased the risk of injury from the thus foreseeable intervening force equally will not be responsible for such result.

Thus we see, in the application of the foreseeability test to the intervening force in cases of indirect causation, a second principle in the law of causation which limits the liability of a defendant who has acted wrongfully toward a plaintiff and to whose actual damage he has been, in fact, a substantial contributing factor. As an incident to the principle applicable

62. *In re Polemis*, *supra* note 28; *Barabe v. Duhrkop Oven Co.*, *Kilduff v. Kalinowski*; *Ethredge v. Nicholson*, all *supra* note 31.

63. *Sullivan v. Creed*, *supra* note 58.

64. *Schwartz v. Jaffe*, 324 Pa. 324, 188 Atl. 295 (1936); *Miller v. Bahmmuller*, *supra* note 56; *Andrews & Co. v. Kinsel*, 114 Ga. 390, 40 S.E. 300 (1901); *Alexander v. Town of New Castle*, 115 Ind. 51, 17 N.E. 200 (1888).

But note: The limitation on defendant's liability depends not on the fact that the intervening force was wilfully or even criminally wrong, but on the fact that this particular wilful or criminal act was unforeseeable. There are numerous instances where a defendant was held responsible for injury caused by an intervening criminal act: *Stansbie v. Troman*, *supra* note 54; *Malloy v. Newman*, 310 Mass. 269, 37 N.E.2d 1001 (1941); *Brauer v. New York Central & H. R.R.*, *supra* note 55. See also *Vaughn v. Montgomery Ward & Co.*, 213 P.2d 417 (Cal. App. 1950); *Theurer v. Condon*, 209 P.2d 311 (Wash. 1949); *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 157 P.2d 372 (1945).

65. *Supra* note 35, the related text and following material.

in certain cases of direct causation, but not as an additional limitation of liability, the defendant in a situation of indirect causation is not legally responsible for the highly extraordinary results of an intervening force even if it is foreseeable.

PRACTICAL APPLICATION

An anticipated criticism of this additional effort to reduce the law of legal cause to a relatively few principles capable of simple expression⁶⁶ and common sense application,⁶⁷ is that it fails to explain the results reached by the courts in certain well known and troublesome factual situations. It will be found, however, that most of these cases do fit into the principles advocated, or otherwise can be satisfactorily explained.⁶⁸

For instance, there is a substantial number of cases where the defendant's wrongful act can be traced into insanity, mental depression or delirium of the injured person, during which he takes his own life. In many of these cases the result has been a refusal to impose liability on the defendant for the death.⁶⁹ Upon proper analysis from the causation approach, however, these cases present no basic difficulty. Assuming that the defendant's wrongful act was in fact a substantial factor in bringing about the condition that gave rise to the self-destruction,⁷⁰ either of the two fundamental causal situations could be involved, depending upon the facts: the act of the suicide may have been involuntary in the sense that it was an irresistible impulse or an unthinking reaction, in which event it would have been directly caused by the defendant and he will be legally responsible⁷¹ unless it can be said that the death was a highly extraordinary result,⁷² or the act

66. Beale's final summary of the legal requirements of "proximity of result" took four printed lines. See Beale, *supra* note 1, at 658.

67. "Theorize as we may on the subject of proximate cause, it is, in its last analysis a question of good common sense, to be solved by a practical consideration of the evidence in each particular case." *Moore v. Northern Pac. Ry.*, 108 Minn. 100, 101, 121 N.W. 392 (1909). See *infra* note 106.

68. A reconciliation of *all* the cases in *all* the books? Colman said it, in *The Maid of the Moor*: "... what's impossible, can't be."

69. A leading case is *Scheffer v. Washington City, V.M. & G.S. R.R.*, 105 U.S. 249 (1882), of which Beale said: "This opinion seems hardly reconcilable with the current of authority on this subject." See Beale, *supra* note 1, at 645. Did the fact that the defendant was a railroad, and that, at the time, railroads were in high favor have any subconscious effect on the result? See *infra* note 101, and the related text.

70. A question of scientific fact. Cf. *Migliaccio v. Public Service Ry.*, 101 N.J.L. 496, 130 Atl. 9 (1925), where the court felt it had not been factually established that the tuberculosis which resulted in death was causally connected with the injury from the defendant's wrong.

71. *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932); *Wilder v. Russell Library Co.*, 107 Conn. 56, 139 Atl. 644 (1927); *Daniels v. New York, N.H. & H. R.R. Co.*, 183 Mass. 393, 67 N.E. 424 (1903). The *Stephenson* case is noteworthy since it involved a successful prosecution for murder where the death was the direct result of the suicide of the victim of the defendant's rape while distracted by pain and shame. See 81 U. OF PA. L. REV. 189 (1933) and 45 HARV. L. REV. 1261 (1933).

72. *Supra* note 40, and the related text, *semble*: *Jones v. Stewart*, 183 Tenn. 176, 191 S.W. 2d 439 (1946), where the case turned on the court's belief that no reasonable person would have expected a healthy young man to commit suicide because he was falsely accused of crime.

of the suicide may have been a voluntary act, and the causation situation is indirect, in which case the liability of the defendant will depend upon the foreseeability of the intervening force, here the act of suicide.⁷³

A second line of cases in which there has been substantial difficulty from the viewpoint of legal cause is where a carrier wrongfully delays the movement of plaintiff's goods and later resumes it, only to have the goods lost as a result of flood, storm, or cold. The diversity of result reached in this type of case has created considerable confusion,⁷⁴ but, properly analyzed, there is no insurmountable difficulty from the viewpoint of the law of legal cause. Initially, a basic question is whether the stoppage, as distinct from the resumed carriage, was in fact a substantial factor in causing the damage,—in other words, would the injury have happened had the delay not taken place? If the halt did not increase the risk of the loss that happened, the wrongful act added nothing to the already dangerous situation.⁷⁵ But where the causation in fact is established and the delay is a substantial factor, either because the storm would have been avoided or its damaging effects lessened if the carriage had not been wrongfully interrupted, the case presents a situation of indirect causation, and the defendant's liability should be determined by the foreseeability of the injury that took place.⁷⁶

A third line of cases where it has been thought that the law of causation presents difficulties is those situations of indirect causation where the intervening force (the direct cause) is an intentionally or even criminally wrongful act. These cases have been touched upon,⁷⁷ but the often expressed befuddlement warrants further consideration. Actually, on causation principles, there is nothing significant in the fact that the intervening force may have been criminal,—the determination of the defendant's liability still

73. *Supra* notes 55 and 56, and the related text. See *Scott v. Greenville Pharmacy*, 212 S.C. 485, 48 S.E. 2d 324 (1948). Defendant was held legally responsible for a voluntary suicide in *Stephenson v. State*, *supra* note 71; *Garrigan v. Kennedy*, 19 S.D. 11, 101 N.W. 1081 (1904).

Defendant was held not legally responsible for a voluntary suicide in *Jones v. Stewart*, *supra* note 72; *Salsedo v. Palmer*, 278 Fed. 92 (2d Cir. 1921); *Daniels v. New York, N.H. & H. R.R. Co.*, *supra* note 71.

74. See Beale, *supra* note 1, at 655. Only the leading cases need be cited: *Denny v. N.Y.C. R.R.*, 13 Gray Mass. 481 (Mass. 1859) and *Micheals v. New York Central R.R.*, 30 N.Y. 564, 86 Am. Dec. 415 (1864). Many authorities are collected in *Grant-Wheeler Shoe Co. v. Chicago, R.I. & P. Ry.*, 130 Iowa 123, 106 N.W. 498 (1906). The high duty imposed upon a carrier to transport safely may be an important factor in imposing liability in these cases: PROSSER, *TORTS* 367 (1941).

Where the defendant whose liability is limited was a railroad, did that fact, and the fact that railroads at the time of the decision were in high public favor, have any subconscious effect on the result? See *infra* note 101, and the related text.

75. See *Douglas, Burt & Buchanon Co. v. Texas & P. Ry.*, 150 La. 1038, 91 So. 503 (1922). Compare those cases in which the risk created by the defendant's wrongful act has been "cured" by a subsequent act, and the hazard removed: *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 113 S.W. 647 (1908); *Chaddock v. Plummer*, 88 Mich. 225, 50 N.W. 135 (1891). *Semble*: *Kingland v. Erie County Agric. Soc.*, 298 N.Y. 409, 84 N.E.2d 38 (1949).

76. *The Mariner*, 17 F.2d 253 (5th Cir. 1927); *Bell Lumber Co. v. Bayfield Transfer Ry.*, 169 Wis. 357, 172 N.W. 955 (1919); *Fox v. Boston & Maine R.R.*, 148 Mass. 220, 19 N.E. 222 (1889).

77. *Supra* note 54.

should depend upon the foreseeability of that particular intervening act.⁷⁸ A case which resulted in no liability for a perhaps foreseeable intervening criminal act is *The Lusitania*,⁷⁹ involving the suits instigated for the deaths and injuries of passengers resulting from the sinking of the vessel by a German submarine during World War I. It will be remembered that the waters into which *The Lusitania* sailed and where she was torpedoed were well known to be infested by submarines, and that the German government had publicly announced its intention of sinking her if she attempted to run the blockade. In denying recovery, the principal ground relied on by the court was the independent illegal act of the submarine that intervened, but making no mention of its foreseeability. The result, poorly reasoned as it may be, can be rationalized on two grounds: (1) Was the ship negligent in venturing into the danger zone,—was it something that the ordinary prudent man might do, in spite of the risk, under the circumstances? If the ship were not negligent, there is no basis for liability at all, irrespective of the law of causation.⁸⁰ (2) Assuming negligence, was the intervening act of the German submarine in sinking an unarmed passenger ship, with hundreds of non-combatants, including women and children, aboard, and in the fact of almost certain involvement of the United States in the war, *in fact* foreseeable? These questions were only incidentally raised, and there was no mention of assumption of risk by the plaintiffs, but while the answers to these questions might justify the result reached, the unsound basic reasoning of the case remains, and it must be regarded, at best, as questionable. Due to the international importance of the incident involved perhaps this district court case has received more attention than it deserves.

Other cases that may be pointed to as instances where the basic principles here advocated do not fit in with the decisions of the courts can be explained by the fact that the court utilizes the language of causation to reach a result that depends on some other well known legal principle. For instance, one court has concluded that the defendant's highly waxed floor was not the "proximate cause" of plaintiff's slipping and falling, when the slightest application of common sense tells us it was. The creation of a highly waxed floor sets the stage, and the intervening act of someone entering and falling is clearly foreseeable. All the court was driving at (and his meaning can be disinterred by a careful reading of the opinion) was that

78. Foreseeable: *Stansbic v. Troman*, *supra* note 54; *Cox v. Horasky*, 318 Ill. App. 287, 47 N.E.2d 728 (1943); *Jones Co. v. State*, 122 Me. 214, 119 Atl. 527 (1923); *Hines, Dir. Gen. of R.R. v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921); *Brauer v. New York Central & H. R.R.*, *supra* note 55. *Contra*: *Andrews & Co. v. Kinsel*, *supra* note 64; *Henderson v. Dade Coal Co.*, 100 Ga. 568, 28 S.E. 251 (1897).

Unforeseeable: *Wannebo v. Gates*, 227 Minn. 194, 34 N.W. 2d 695 (1948); *Miller v. Bahmmuller*, *supra* note 56; *Alexander v. Town of New Castle*, *supra* note 64.

79. 251 Fed. 715 (S.D. N.Y. 1918). Is it possible that the court may have been shocked at the extent of the liability incurred by the defendant if the result were otherwise? Was the defendant negligent? See 251 Fed. at 728. Was the intervening illegal act foreseeable? See 251 Fed. at 736. See *infra* note 99, and the related text.

80. See GREEN, RATIONALE OF PROBABLE CAUSE 158 (1927).

there was no evidence in the case that defendant was negligent in applying the wax, either as to the place or manner of application, and that the inference of negligence sometimes permitted by the doctrine of *res ipsa loquitur* would not arise in that jurisdiction merely from the fact that the floor was waxed. In the absence of adequate proof of negligence, the plaintiff's case fails.⁸¹ Similarly, the courts may say that because of the plaintiff's negligence, the defendant's negligence is not the "proximate cause" of the injury: all that is being done by the court is to apply the familiar rule of contributory negligence.⁸²

Apart from these cases where the courts use the vocabulary of legal cause, there is a very important segment of cases where limitation of liability has been granted to the defendant for the results of his wrongful act where all the elements of liability⁸³ exist, and where the usual application of the accepted principles of the law of causation do not warrant any limitation. Certain of these cases present familiar problems, such as the question of recovery for fright, or mental or emotional disturbance, generally denied in the absence of physical manifestation, and still denied in some jurisdictions in the absence of physical contact.⁸⁴ This is a question outside of the scope of this article, except to point out that the reasons given by the court when the liability of the defendant is limited, are not related to the law of causation, but depend upon such things as difficulty of proof of causation in fact, of foreseeability for the purpose of establishing negligence, difficulty of calculating damages, the possibility of fraud and the opening of a wide field for fictitious claims, all totalling to the conclusion that it was not safe, as a matter of policy, for the courts to deal with these claims unless accompanied by at least physical manifestation, if not bodily contact.⁸⁵

There have been other instances in the law of torts where the liability of the defendant for the wrongful injury he has caused is limited by some reason of policy, real or fancied, expressed by the courts. Thus began the doctrine of *Winterbottom v. Wright*,⁸⁶ limiting the liability of a manufacturer or supplier for his negligence, for which he would ordinarily be liable, when the injured party was not "in privity" with the defendant,—a policy no longer generally recognized,⁸⁷ although still occasionally applied in cases

81. *Springall v. Fredericksburg Hospital and Clinic*, *supra* note 60.

82. *Henry v. St. Louis, K.C. & N. Ry.*, *supra* note 6, which note also see for other analogous examples of improper use of causation language. Legal cause can be found under the applicable principles of causation where the plaintiff has been contributorily negligent: *Regina v. Holland*, 2 Moo. & Rob. 351, 174 Eng. Rep. 313 (1841). But see *Dantzer Shipbuilding & Drydocks Co. v. Hurley*, 119 Miss. 473, 81 So. 163 (1919).

83. *Supra* note 11, and the related text.

84. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); PROSSER, *HANDBOOK OF THE LAW OF TORTS* 216 (1941). See also RESTATEMENT, TORTS §§306, 312, 313 (1934).

85. See *Orlo v. Conn. Co.*, 128 Conn. 231, 21 A.2d 402 (1941).

86. 10 M.&W. 109 (1842).

87. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

involving contractors who construct or make repairs.⁸⁸ Such also is the basis for the so-called "New York rule" in cases of spreading fires, limiting the liability of the defendant to the damage done by his negligent fire to the adjacent buildings,⁸⁹ for although the court used language indicating the more distant destruction to be the "remote" results, the real reason for the decision was the expressed feeling of the court that a contrary holding would create a liability against which no prudence could guard, and to award a punishment quite beyond the offense committed. In *H. R. Moch v. Rensselaer Water Co.*,⁹⁰ where the defendant negligently failed to supply water at proper pressure for fire hydrants after notice of the existence of a fire, and but for this failure the damage to the plaintiff's building would have been lessened, the court limited the liability of the defendant largely because of a reluctance thus to impose liability on this essential public utility. And in *Ultramares Corp. v. Touche*,⁹¹ a certified public accountant who negligently prepared a balance sheet that he knew would be used for the establishment of credit was protected against liability to a banking house which had relied thereon in extending credit, fearing that undue imposition of liability would be prejudicial to accountants and other professional men (including lawyers) to a degree that would injure the entire professional element of the community.

Where there is this desire of the courts to reach a result contrary to that called for by the normal application of accepted legal principles, which result the court believes would be prejudicial to the best interests of the community, there are two roads open to it: to hew to the line and decide the case according to the law applicable, leaving it to the legislature to enact such statutory changes⁹² as it, the representative of the public, finds appropriate; or the court may decide itself to establish and apply the policy. Should the court adopt the latter course,⁹³ it may do so in one of two ways: openly declare the policy, and refuse to reach the result called for by normal

88. See, for instance, *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926). The trend is to eliminate even this limitation; PROSSER, TORTS 694 (1941).

89. *Ryan v. New York Central R.R.*, 35 N.Y. 210, 91 Am. Dec. 49 (1866). The rule seems followed nowhere else, and it has been limited in New York: *Homac Corp. v. Sun Oil Co.*, 258 N.Y. 462, 180 N.E. 172 (1932).

90. 247 N.Y. 160, 159 N.E. 896 (1928). Apparently a minority view. See 45 HARV. L. REV. 393 (1932).

91. 225 N.Y. 170, 174 N.E. 441 (1931).

92. A familiar principle. For example, in *Judevine v. Benzies-Montayne Co.*, 222 Wis. 512, 269 N.W. 295 (1936), the court refused to recognize a right of privacy on the facts alleged and admitted by demurrer, indicating that if a right of action for violation of the right of privacy is to be created it is more fitting that it be created by the legislature.

93. There is no reason why the court should necessarily refrain from so doing. The argument based on legislative action to change the court's result is as strong when the court recognizes or creates policy as when it ignores it; in either event it is the legislative prerogative, subject only to constitutional limitations, to reverse the court conclusion. In *Robeson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), after the court had denied the existence of a right of privacy, a statute was passed creating the right in certain situations. See N.Y. CIV. RTS. LAW § 50; N.Y. LAWS 1903, c. 132, § 1.

application of the legal principles, as in the named cases discussed above,⁹⁴ or the court may distort some established legal principle, or apply the undistorted principle in an unorthodox way, in order to reach the result desired.

When the court forthrightly establishes an exception to the normal result, there can be but little quarrel, even though one might disagree with the policy expressed and applied. Indeed, there well may be instances in which such action would prevent the imposition of a literally ruinous liability that would destroy a valuable and essential community asset before effective remedial action by the legislature could be taken.⁹⁵ Such exceptions to general rules of legal liability in order to limit responsibility are at least understandable, and, most important, do no violence to the established system of rules and do not offend the straight thinker, since, as stated exceptions, they are recognized as such and can be dealt with accordingly.

When, however, the limitation of liability is achieved by the court's distortion or unorthodox application of accepted legal principles, whether done deliberately or subconsciously, trouble results.⁹⁶ The distortions and unorthodoxies tend to become perpetuated, the law becomes confused, and the stench arises.⁹⁷

In the named cases discussed in the text above⁹⁸ we knew, because the court pointed it out, the policy that was behind the result reached. But no one knows the degree to which the court in *The Lusitania*⁹⁹ was appalled subconsciously at the enormity of the damage the defendant had incurred if liability were to be imposed.¹⁰⁰ And equally, no one knows the extent to which the courts in the last half of the 19th century were disposed, subconsciously, to help the development of railroads by occasional limitation of liability, although there is basis for believing that there was such a dis-

94. *Supra* notes 85-90, and the related text.

95. For example, on Thanksgiving Eve, 1950, there was a disastrous wreck on the Long Island Railroad in which there were some eighty deaths and scores of injuries. According to newspaper accounts (Washington, D.C., Post, Nov. 23, 1950, p. 1) the Long Island Railroad, already bankrupt and operating at a deficit, is actually the busiest railroad in the world, and the sole efficient means of transportation to and from New York City for thousands upon thousands of commuters living on Long Island. At this writing, the reasons for the disaster have not been announced, but assuming the facts warrant imposition of liability according to accepted legal principles properly applied, and that the aggregate damages that would result were so large as to force discontinuance of the road, would a court perhaps be justified in somehow limiting liability by the application of some appropriate policy if, with intellectual honesty, one can be found? Should the Long Island Railroad be permitted by this device to continue in its essential service to the community even at the cost to the injured of bearing the burden of damage that the railroad actually caused by its wrongful act? Perhaps the answer is a compromise: that under these conditions the entire community should bear the burden. If so, it is a matter for the legislature and not the courts.

It is an interesting coincidence that this is the railroad the liability of which was limited in the *PALSGRAF* case, *supra* note 7.

96. In this type of case we seldom *know* whether the court was deliberately trying to reach a result and rationalizing at the expense of legal principles or their application, or whether it was subconsciously diverted from the true path. In either event the results illustrate the adage that "hard cases make bad law."

97. See Seavey *supra* note 4, and the related text.

98. See notes 85-90 *supra*, and the related text.

99. See note 79 *supra*, and the related text.

100. GREEN, RATIONALE OF PROXIMATE CAUSE 158 (1927).

position.¹⁰¹ Did Cardozo and the majority of the New York Court of Appeals in the *Palsgraf* case¹⁰² have a subconscious urge to hold the Long Island Railroad harmless in a "freak" accident with unusual results and, in order to do so, apply an accepted legal principle (that a successful negligence action requires violation of a duty owed to the plaintiff) to the facts in an unorthodox way to permit the conclusion that there was no such duty? Did Judge Dean and the others of the Supreme Court of Pennsylvania in the *Wood* case¹⁰³ feel a similar subconscious urge to hold for the Pennsylvania Railroad and, in order to do so, apply a distorted rule of causation (saying that an obviously direct cause required foreseeability of result) to the facts? These two cases of startlingly similar facts, including an injury almost unbelievably unexpected, reached the same result: a limitation of the liability of a wrong-doing defendant for damage in fact directly caused by his wrongful act. That these results were identical carries far more significance than do the diverse methods by which the respective courts reached those results.¹⁰⁴

SUMMARY

Assuming all other elements essential to impose liability on a defendant are present, the basic principles in the law of causation are these:

1. A defendant is not legally responsible for any injury unless, in fact, his culpability is a substantial factor in bringing it about.
2. A defendant is legally responsible for all injury that his culpability is, in fact, a substantial factor in bringing about, unless:
 - a) the situation involves, as to the defendant, direct causation in the sense that his force directly activates another force which brings

101. "It may be noted that the early cases against railroads are particularly strong in favor of defendants." See McLaughlin, *supra* note 8, at 162.

102. See note 7 *supra*.

103. *Ibid*.

104. Further reference to the numerous examples would be redundant, but in *Henderson v. Dade Coal Co.*, *supra* note 78, the defendant negligently permitted a dangerous convict, described as "a man of violent passions, prone to a desire for sexual intercourse" (characteristics well known to the defendant), to escape, and while at large he committed a particularly atrocious rape of the plaintiff. The reason that the defendant was responsible for the custody of this prisoner was that the right to his labor had been leased from the State, and the contract as provided. The tears of the court for the plaintiff did not prevent limitation of the defendant's liability, and this was achieved on the basis that as a matter of law the intervening criminal act was not reasonably foreseeable, a strange application to these facts where the foreseeability seems so apparent that it might have been so held without the aid of a jury. Certainly there was a jury question on this so essential item. One cannot but wonder the degree to which the court may have been subconsciously influenced in its decision by an awareness of the effect of imposing liability on the lessee of prisoners who negligently permit an escape for the foreseeable crime they may commit while at large. The added potential liability might make the utilization of prison labor so risky that the state's revenue from this source would be substantially decreased. In *Hines v. Garret*, *supra* note 78, where the state's interest was absent, the court held a defendant liable for the rape of a plaintiff who had been exposed to such offense by the negligent act of the defendant.

about the injury, and the actual result is deemed, after the event, to have been highly extraordinary; or unless

b) the situation involves, as to the defendant, indirect causation and the independent intervening force is not, in fact, reasonably foreseeable; or unless

c) the court, for reasons of policy, or similar reason satisfactory to it, sees fit to limit the liability of the defendant by specifically exempting him from liability from the normal application of causation or other principles.

Caveat: Cases in which the courts seem to have desired a given result limiting liability and, in an attempt to rationalize to that result, have distorted established rules into rules which permit the desired result in the factual situation involved, or have applied the established rules to the factual situation involved in an unorthodox manner which permits the desired result, are anachronisms and have no place in a logical system of law based on decided precedents.

“The question of proximate cause, in its legal acceptance, is, or ought to be, a practical question of common sense.”¹⁰⁵

105. *Ruffin Coal & Transfer Co. v. Rich*, 214 Ala. 633, 108 So. 596 (1926). See note 67 *supra*.