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Workable Rules For Determining Proximate Cause*

PART I.

THE PROBLEM OF CAUSATION AND ITS SCOPE

The first question in causation relates to actual cause or cause in fact. Was the defendant's, or the plaintiff's, where it is sought to bar him by reason of his contributory fault, act or omission of duty a cause in fact of the injury suffered? The word "cause," where cause in fact is meant, has a more inclusive meaning in law than it has in scientific or popular usage. In common usage cause is confined to those antecedent events which are conceived of as creating or producing the event in question. In law, however, it means any and all antecedents, active or passive, creative or receptive, which were factors involved in the occurrence of the consequence. For example, if A sells B a rope and B uses the rope to hang himself, A is regarded in the law as the cause in fact of B's hanging; or if X drives his car down the street and it is struck and destroyed by lightning, X's driving the car is a cause in fact of the car's destruction.

There is entire agreement on the part of courts and legal theorists that the tortfeasor is not to be held responsible for every consequence of which his act or omission is a cause in fact. Cause in fact is essential to liability, but liability must be further delimited. The problem of proximate cause has been brought to apparent confusion and contradiction by the decisions of courts, and legal theorists attempting to show the courts up have produced a situation little short of chaos. This work is not an attempt to add another original contribution to a topic which has been cursed already by originality. It is rather an honest and sympathetic effort to extract from the decisions, the largest body of consistent and sound principles possible and to formulate it in rules which will be capable of practical application by lawyers and courts, in other words, a system of workable rules.

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1 DeLong v. Miller & Lux (1907) 151 Cal. 227, 90 Pac. 925; Lawrence v. Southern Pacific Co. (1922) 189 Cal. 434, 205 Pac. 966.

In RESTATEMENT OF THE LAW OF TORTS (Am. L. Inst. 1925) 12, § 6, it is stated that: "An act or omission may be the actual cause of an invasion of which it is not the legal cause. On the other hand, an act or omission cannot be the legal
proximate cause is one of determining when a tort-feasor shall be exempt from liability for effects to which his wrongful act actually contributed. The requirement of proximate or legal cause merely limits liability to those causes in fact which are of sufficient causative significance or of such substantial nature as causes to warrant the law treating them as responsible causes. There are several other elements which are prerequisites to liability, which delimitations must be differentiated from that of proximate cause. The interest invaded must be of a sort to which the law extends protection; it must be protected against the type of conduct by which it was invaded; the plaintiff must not have defeated his right or precluded himself from bringing an action by his own conduct. The act, or at least the causing of the damage, must have been wrongful in law toward someone. The more recent and better authority requires in cases of negligence that the act or omission shall be negligent toward the plaintiff or the class to which he belongs and to the particular interest or species of interest invaded. But the law further delimits liability; not only must the interest have been one protected against interference by the type of conduct which

cause of an invasion unless the invasion is the result of an act or omission, that is, if the invasion would have occurred even though there had been no such antecedent act or omission. To this the one exception is where an invasion is brought about by the simultaneous operation of two forces, each independent of the other and each of itself sufficient to bring about the invasion had the other not been operating. In such a case an act which sets either of these forces in motion, or an omission which permits the operation of either, is regarded as the legal cause of the invasion, although the act or omission is not a necessary antecedent of the invasion and so is not an “actual cause” thereof, as the term “actual cause” is above defined.”

Professor McLaughlin says: “By causation in fact we here mean causation sine qua non, that is, if the harm would not have happened but for the act, the act in fact caused the damage. . . . (discussing the cases where two acts concur to produce a result where either alone would have been sufficient). A principle of law or policy enters in and compels us either to modify our definition of causation in fact so as to include a conception which is not factual but legal or to say that in such case we have causation in law without causation in fact. Perhaps the latter alternative is preferable.” McLaughlin, Proximate Cause (1925) 39 Harv. L. Rev. 153.

See discussion of Cause in Fact, infra, Part II.

2 In Smith v. London & Southwestern Ry. (1870) 5 C. P. 98, 6 C. P. 14, probability of harm to some one though not toward the plaintiff's interest seemed in the mind of the judges to have been enough. See controversy on this point between Dean Young B. Smith and Dean Leon Green, Palsgraf's Case (1930) 30 Col. L. Rev. 789, note 5a. A good case illustrating the older view of the Smith case is Osborne v. Van Dyke (1901) 113 Iowa 558, 85 N. W. 784.

invaded it, and the conduct have been wrongful toward the class of interest in question, but also there must have existed a duty not to invade the interest. In a somewhat narrow class of cases of negligence where the wrong consists in subjecting an interest to a particular hazard the harm suffered must have resulted from exposure to such hazard. This is sometimes treated under negligence, but it seems not improper to treat it as a question of causation, for it is dealing essentially with the causal relation of the tort-feasor's fault to its consequence. For example, if the defendant hands a small boy a loaded shot-gun, he is negligent because the boy may shoot himself or another. If the boy instead of so doing drops the gun on his foot and breaks a bone, the defendant is not liable because his negligence consisted in exposing the plaintiff and others to being shot and the result which happened, i.e., the broken bone, was not the consequence of that hazard.

Where the injury results from the violation of a statute, liability may be limited by reason of the fact that the statute was designed to

4 See Restatement of the Law of Torts (Am. L. Inst. 1929) 21, §165, comment (e).

5 In Schwartz v. Shull (1898) 45 W. Va. 405, 31 S. E. 914, this requirement that the consequence for which it is sought to hold the defendant liable must result from the exposure to the particular hazard for which the defendant is responsible was treated as a problem of proximate cause. In that case the defendant's negligence consists in packing together in one box some dynamite and some caps, covered with sawdust. After this, another person carried this box and placed it on the tender of a locomotive which act of negligence exposed the dynamite to sparks from the engine from which the box caught fire, exploded and injured the plaintiff who had attempted to throw it off the engine. Here the defendant was held not liable on the ground that his act was not a proximate cause of the injury. It is clear that the sound reason for not holding him is that the injury to the plaintiff did not follow from the negligence of the defendant in packing the dynamite and caps together in one box but from a distinct act of negligence, the negligence of the person who placed the box of dynamite and caps upon the tender of the engine where it was exposed to sparks.

Butz v. Cavanaugh (1897) 137 Mo. 503, 38 S. W. 1104 is another illustration of the court's treating as a problem of proximate cause this requirement that the injuries must result from the negligence of the defendant and, where that negligence is exposure to a particular hazard, from that hazard. Here the city was guilty of negligence to users of the highway by failing to erect a fence between the street and a dangerous excavation, dangerous because of the steep bank at that place. The excavation was used as a dump and the plaintiff, a twelve year old boy, voluntarily went into the excavation and burned his feet in the smoldering fire thereon. The court said that the wrongful act of the city was not the proximate cause of the injury to the boy who voluntarily went into the excavation after something he saw there and burned his feet. The case is clearly resolved upon the doctrine that where the defendant's negligence consists in exposing the plaintiff or persons of his class to a particular hazard and the injury does not result by reason of this hazard the defendant is not liable. Here the hazard was the steep embankment without a fence and the injury did not occur by reason of that hazard.
protect only a certain class of persons or a particular interest or to protect only against a particular type of hazard.6

Liability for consequences resulting in fact from the defendant's wrong has been further delimited by the courts to consequences which they conceive of as legal or proximate.7 Proximate is the word most commonly used by the courts to express this relationship of cause to consequence. Its connotation in common usage of "near" has frequently led courts to misapply the principle in law. For instance courts sometimes assume that there can be but one proximate cause of a consequence or that if some some cause is "more proximate" than the one for which it is sought to hold the defendant, the defendant's cause is remote.8 This misconception is responsible for the erroneous explanation frequently given for the non-liability of the defendant in cases of contributory negligence on the part of the plaintiff.9 In spite of this ambiguity in the meaning of the word, it is used here because it is a word used almost universally by the courts and because better than any of the substitute words, such as "legal" which is used by several writers,10 it connotes an element of substantial causative relation between defendant's wrong and the consequence for which it is sought to hold him liable.

I. Reasons for Delimiting Liability to Proximate Consequences

In addition to the limitations on liability previously mentioned, why do courts seek to further restrict liability to proximate consequences? Many explanations have been given. Professor Joseph H. Beale suggests that it is to expedite the work and reduce the burden of courts trying cases. He says "The consequences of an act may be innumerable; to trace them would require infinite time and patience. Here, as in all affairs of life, it is necessary to reach a result which will secure the greatest amount of consideration which is compatible with an equal consideration to all other interests. To apply this principle to the question under discussion, the court can give to the tracing of the consequences of any particular act only its fair share of all the available time, considering the other acts which are waiting its attention. If,

7 See Note (1929) 59 A. L. R. 884, collecting cases where plaintiff is required to show proximate cause.
8 Belding v. Johnson (1890) 86 Ga. 177, 12 S. E. 304. In Bole v. Pittsburgh Athletic Co. (D. C. W. D. Pa. 1913) 205 Fed. 468, the trial court asked the jury to find whether the negligence of the defendant in leaving a narrow passage between the front door and the elevator or the jostling of the crowd was the proximate cause of the plaintiff's injury, the court apparently assuming that if one act was the cause the other could not be.
9 Infra note 78.
10 Restatement of the Law of Torts (Am. L. Inst. 1925) 12, §6; Smith, Legal Cause in Actions of Tort (1911) 25 Harv. L. Rev. 103.
for instance, the court is called on to investigate the dropping of some substance, the court will watch it while it falls through the air; it will continue to watch it after it has fallen into an unstable or dangerous position; but as soon as it has reached a safe and stable rest the court will turn away to the investigation of some other act. But it seems clear that the explanation of the doctrine of proximate cause cannot be the expedition of the trial of cases in court. Very infrequently will proof of cause in fact be dispensed with on the ground that if it were shown it would be remote. In practically all cases, when the question of proximate cause arises, the lawyer or the court has a definite consequence and a definite act or breach of duty of the defendant in mind and the question for which an answer is sought is, is this wrong of the defendant’s a proximate cause of the consequence in question? In most instances except where there is uncertainty in the proof, the question whether there is a cause in fact relation between the defendant’s wrong and the consequence is easily discovered and usually answered before the question of proximate cause is approached. To make this further inquiry, in such cases, of whether or not this cause in fact relation is also a proximate cause, instead of expediting the work of the court would serve to retard it and according to Professor Beale’s argument, since it turns the court away from investigating other problems, diminishes rather than adds to the achievement of justice.

The securing of justice is sometimes urged as the basis of the requirement of proximate cause. When a damage to the plaintiff occurs through the operation of several factors some of which are more substantial than the one for which the defendant is responsible, it may appeal to most persons as unjust, particularly if the defendant’s factor is trivial, to permit the plaintiff to throw the whole loss on the defendant. As there is no human method of properly apportioning the loss between the plaintiff and defendant, either the one or the other having to bear the whole loss, it will in many instances seem more satisfactory to leave the loss where it originally falls.

Another reason for delimiting liability through this added requirement that the defendant’s wrong must bear a relation of proximate cause to the consequence is a great reduction of the burden thrown on courts of shifting losses from defendants to plaintiffs. This burden will be more fully reduced if the rules of proximate cause can be made certain and definite. Further to permit the plaintiff to hold the defendant liable in every case where cause in fact exists no matter how insignificant a factor defendant’s cause may have been will unduly hamper legitimate activity.

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1 Selected Essays on the Law of Torts (1924) 737; Beale, Proximate Consequences of An Act (1920) 33 Harv. L. Rev. 640.
Whatever may be the true reason or reasons, and there are perhaps several, this caution should be observed. The principle of proximate cause and the specific rules laid down to aid in the application of that principle should not be confused with the reasons or the object for which it exists. Rules of law must be more or less definite and workable; not so the principles upon which they rest, or the reasons for which they exist. For example, we have two very definite and distinct rules of property law, the rule against restraints on alienation and the rule against perpetuities. Under the first rule all restraints on the alienation of vested interests are void, while under the second, future interests must become vested within a certain time, usually lives in being and twenty-one years. The object or purpose of these two rules is one and the same, namely, to prevent the tying up of property or taking it out of commerce. The rules are clear, definite and workable but the reason or principle supporting the rules is not practically workable and could not be used by the court, at least without confusion, except by means of the rules. The same holds true generally throughout the law. Practically all rules of law have as the basis of their existence one or more of the following reasons, namely, public policy, justice, fairness or expediency. But these reasons are not in themselves rules and are not workable as such. Many of the proposed tests of the proximate or legal cause are not rules of law but reasons for rules. “Justly attachable cause” proposed as a rule to determine proximate, legal, or responsible cause is an excellent example of confusing a rule with the reason for it. The securing of justice in the administration of the law is undoubtedly one of the reasons for the existence of the requirement of proximate cause but so is it the basic reason for limiting liability to culpable conduct. But what an absurd state of uncertainty and confusion would result if we did away with the definite rules of culpability and attempted to apply the test in each instance “is it just?” No more can we have certainty and uniformity and eliminate confusion by applying the test “it is just?” to determine proximate cause.

Aside from the uncertainty it produces, the test of justice has the further objection that the requirement that defendant’s cause be a substantial factor rests, as has been shown, on other grounds as well as on justice. A result which was not unjust might not satisfy the other reasons for the requirement. What is sought to be found under the requirement of proximate cause is whether defendant’s wrong was a substantial or material factor in bringing about the injury. But whether it was a substantial or material factor is no more a test of proximate cause.

12 Edgerton, Legal Cause (1924) 72 U. of Pa. L. Rev. 211, 343.
cause than culpability is a test of the fault element required in a tort. As in the field of culpability so in the field of proximate cause or substantial factor more specific and definite rules are needed to make the requirement practically applicable.

II. Tests That Have Been Proposed

Many tests have been proposed. We will now examine those that have had any considerable following.

A. "In jure non remota causa sed proxima spectatur"

One of the frequently quoted tests in law books is Lord Bacon’s maxim, "In jure non remota causa sed proxima spectatur," which literally means that the antecedent nearest in space or time is to be regarded as the proximate cause. So regarded the test is particularly misleading and its inadequacy is demonstrated by the fact that in many cases in which an antecedent which is not nearest in space or time to the consequence in question has been treated as a proximate cause. Smith says of this test, "the use of the maxim as a universal solvent of difficulties has been productive of infinite confusion and error." But the meaning of Lord Bacon’s maxim is not clear. If the maxim is taken to mean that in determining liability for a loss responsibility of the defendant for the final or nearest cause must be established, it is not confusing. Once the final or immediate cause of the consequences for which it is sought to hold the defendant responsible is ascertained then our whole attention may be directed to answering the question of the responsibility of the defendant for that final cause.

B. "Causa sine qua non"

This is usually called the "but for rule." But for the defendant’s act the consequence in question would not have occurred. This test would often impose liability for acts very remote in time or space and where the defendant’s act was a most insignificant and incidental factor. It would frequently require the imposition of liability in cases where it would be absurd to do so. To illustrate: "Suppose D wounds P, which causes P to go to a hospital for treatment, which causes a nurse, Q, to administer to P, which causes P to make love to Q, which causes Q’s husband R, from nervousness and irritation, to go on a reckless automobile ride in the course of which he runs over P as P is leav-

\[\text{13} \text{ SELECTED ESSAYS ON THE LAW OF TORTS (1924) 652; Smith, Legal Cause in Actions of Tort (1911) 25 HARV. L. REV. 106.} \]
\[\text{14} \text{ Ibid.} \]
\[\text{15} \text{ SELECTED ESSAYS ON THE LAW OF TORTS (1924) 730; Beale, The Proximate Consequences of an Act (1920) 33 HARV. L. REV. 633.} \]
\[\text{16} \text{ Beale, Recovery for Consequence of an Act (1895) 9 HARV. L. REV. 80, 81.} \]

The absurdity of the "but for rule" as a test of legal or proximate cause was demonstrated by Justice Ladd in Gilman v. Noyes (1876) 57 N. H. 627, 631, where the defendant had left down pasture bars which made possible the escape of plaintiff's sheep and they had escaped and were killed by bears. The trial court had instructed the jury, "that if the sheep . . . escaped in consequence of the bars being left down and would not have been killed but for the act of the defendant, he was liable for their value." Mr. Justice Ladd, in discussing this test, observed, "But it is equally certain, without any finding of the jury, that they would not have been killed by bears if the bears had not been there to do the deed; and how many antecedent facts the presence of the bears may involve, each one of which bore a causative relation to the principal fact sufficiently intimate so that it may be said the latter would not have occurred but for the occurrence of the former, no man can say. Suppose the bears had been chased by a hunter, at any indefinite time before, whereby a direction was given to their wanderings which brought them into the neighborhood at this particular time; suppose they were repulsed the night before in an attack upon the beehives of some farmer in a distant settlement, and, to escape the stings of their vindictive pursuers, fled, with nothing but chance to direct their course, towards the spot where they met the sheep; suppose they were frightened that morning from their repast in a neighboring corn field, and so brought to the place of the fatal encounter just at that particular point of time.

"Obviously the number of events in the history not only of those individual bears, but of their progenitors clear back to the pair that, in instinctive obedience to the divine command, went in unto Noah in the ark, of which it may be said, but for this the sheep would not have been killed, is simply without limit. So the conduct of the sheep, both before and after their escape, opens a field for speculation equally profound and equally fruitless. It is easy to imagine a vast variety of circumstances, without which they would not have made their escape just at the time they did though the bars were down, or, having escaped, would not have taken the direction to bring them into the way of the bears just in season to be destroyed, as they were. Such a sea of speculation has neither shores nor bottom, and no such test can be adopted in drawing the uncertain line between consequences that are actionable and those which are not."

Infra Part II, Cause in Fact.


Bohlen, *Studies in the Law of Torts* (1868) 505. In *In re Michigan S.S. Co.* (D. C. N. D. Cal. 1904) 133 Fed. 577, 579, the court quotes from *Am. & Eng. Ency. of Law* as the governing principle, negligence "cannot ordinarily be said to be the proximate cause of an injury when the negligence of another in-
cases where it holds the last wrongful human actor to be a responsible cause of the consequence and it sometimes gives a sound result to exclude earlier wrongful actors from responsibility. But in both situations there are too many exceptions to make it a useful rule. To illustrate, we may often exempt the last wrongdoer from liability, as for example, where an independent unforeseeable cause of nature intervenes to cause the injury immediately. A railway company wrongfully delays in the shipment of goods and on sending them forward after the wrongful delay they are struck by lightning. The great weight of authority, and soundly it is believed, relieves the company, the last wrongdoer, from liability for the destruction of the goods. On the other hand the cases are numerous where the defendant who is not the last wrongdoer in the chain of antecedents is properly held liable. Thus where the defendant who negligently leaves property exposed where he can reasonably foresee a thief will steal it should not escape liability for its loss and does not by the decided weight of authority although he was not the last wrongdoer. The case is even clearer if the defendant left the property exposed with the desire and expectation that a thief would steal it.

D. A Cause Distinguished from a Condition

It is sometimes assumed by courts that if the defendant merely furnished the condition which made possible, as distinguished from causing, the damage, he will not be held liable. It has been shown that it is not possible to make a distinction between antecedents of a damage, as to whether they are cause or condition, that will aid in solving the problems of causation. In many situations where it seems appropriate to classify the defendant's antecedent in one or the other cate-

dependent human agency has intervened and directly inflicted the injury." The opinion also quotes Cook, Torts at length to the same effect.

A more recent case of importance adopting the rule by way of dictum is The Lusitania (D. C. S. D. N. Y. 1918) 251 Fed. 715, 732, where the court said, after finding the defendant not guilty of negligence, "There is another rule, settled by ample authority, namely, that even if negligence is shown, it cannot be the proximate cause of the law for damage, if an independent illegal act of a third party intervenes to cause the loss."

A recent English case that has been much criticized as a return to the last wrongdoer rule is Singleton Abbey v. Paludina [1927] 1 A. C. 16.


22 Infra Part III, Section II, F.


25 Smith, op. cit. supra note 13 at 111, citing JAGMARD, HANDBOOK OR THE LAW OF TORTS (1895) 64; POLLOCK, TORTS (8th ed. 1908) 464, note L.
nothing turns on it, but more commonly it is an impossible task to make this classification of antecedents into conditions or causes.

E. The Probable Consequence Test

This test, as Professor Smith has shown, consists of two distinct propositions. One is that the defendant is liable for probable consequences and the other that he is free from liability for improbable consequences. As to the first, it may be said that practically every writer who has had occasion to refer to the law agrees that the defendant's wrong is the proximate or legal cause of all probable consequences. As to the second, most writers since Professor Smith published his famous articles on "Legal Cause in Actions of Tort" have accepted it as demonstrated that the improbability of consequences must be rejected entirely as a test of what is not proximate. It is submitted that neither is the first proposition that all probable consequences are proximate universally true, nor can improbability be entirely rejected as a test of remoteness. An examination of the cases makes it apparent that courts generally hold that a probable consequence is not proximate if it results immediately from an unforeseeable, intervening, independent cause without which it would not have occurred, or, in many instances, even if it results from a deliberate or voluntary dependent act of a human being. On the other hand an examination of the cases makes it apparent that the courts reach just and desirable results in a greater portion of the cases in which they hold consequences not to be proximate by applying the test of improbability. Too many legal theorists have jumped to the conclusion that since there are many cases in which it is properly found that consequences are proximate although they were improbable, that improbability as a test must be rejected completely. The truth lies between these extremes. As probability is an important aid though not a conclusive criterion in determining the existence of proximity of causation, so improbability is likewise useful but not conclusive in determining that proximity does not exist. It seems that in a considerable portion of the cases where causes intervene after the defendant acted improbable consequences are not proximate. An analysis of the decisions will convince the reader, it is believed, that the courts are not contradicting themselves or unsound in holding that improbable or unforeseeable consequences resulting immediately from unforeseeable

26 Smith, op. cit. supra note 13 at 114.
27 Ibid. 103, 223, 303.
28 Professor McLaughlin is one who still uses it. McLaughlin, Proximate Cause (1925) 39 Harv. L. Rev. 149.
29 See infra Section IV, Part III, A, B, 1 and 2.
30 Ibid. A, B, C.
intervening causes are generally remote, yet in several situations are proximate.\textsuperscript{31}

Three specific objections which are raised, against the use of probability or foreseeability as a test of proximate or legal cause, by Professor Smith, require special discussion at this point. He objects first, that as the law stands, the defendant is liable for probable consequences but he is not always free from liability for improbable consequences; second, the test of probability should not be used to determine negligence and then used again to determine legal cause; and third, "the causative effect of a defendant's tortious conduct is not increased by the fact that a particular result was foreseeable."\textsuperscript{32}

It is submitted, however, that Professor Smith's objections to the use of foreseeability in determining whether the defendant's wrong was a substantial factor or the proximate cause of the consequence are not insuperable. As to the first objection, it may be said that it does not follow that if the law should regard all reasonably foreseeable consequences as proximate all non-foreseeable ones are remote. The probable consequence test if used does not have to be the sole test. While all acts possessing such parturient attributes, that the defendant while engaged in them, can reasonably foresee that they will bring harmful results, which they later do, may properly be regarded as constituting a substantial factor in bringing about the result. Nevertheless, it does not follow that some acts which he does not foresee will produce the consequences which follow are not substantial factors in producing the consequences. Furthermore, the question may be asked, is Professor Smith not inconsistent in rejecting foreseeability \textit{in toto} as a test of substantial factor and at the same time admitting that all acts producing foreseeable consequences are substantial factors?

As to the second criticism, it may be replied that we are not duplicating the use of probability in using it to determine negligence and again to determine proximate cause. Insofar as the courts have receded from the idea that foreseeability of some harm is sufficient to establish negligence, and require foreseeability of harm to the plaintiff's interests in order to make out negligence, foreseeability has less application in the field of causation. However, the uses of foreseeability in negligence and in causation are distinct. In negligence we ask whether the defendant has been guilty of unreasonable risk of causing harm. The risk he is allowed to take may vary with the circumstances. The magnitude of the risk allowed increases with the utility of the conduct. He will be permitted to take a much greater risk to his own life in

\textsuperscript{31} Ibid.

\textsuperscript{32} Smith, op. cit. supra note 13 at 226.
saving the life of a child than he would in saving the life of a puppy. The fact that he can foresee harm to himself if he acts does not alone make him negligent. In proximate cause, foreseeability is used in a less variable sense. It means reasonable foreseeability and does not involve this balancing of risk against utility. Again in negligence, the question is whether or not the defendant could foresee some harm. In proximate cause, foreseeability has no application except where new causes intervene between the defendant's act and the consequence and the consequence results from the intervening cause and the question is whether this particular intervening cause or a cause of the genus from which the harm resulted was foreseeable as likely to occur. It is possible to have the defendant take an unreasonable risk of harm toward the plaintiff or plaintiff's interests so that he may be guilty of negligence and yet not be the proximate cause of the consequence which he could reasonably foresee, if there intervened an unforeseeable cause which immediately produced the injury and without which the injury would not have occurred.\(^3\) It will often happen in the case of an intervening, unforeseeable cause that the defendant escapes liability because his act is not a substantial factor in producing the consequence for which it is sought to hold him liable. It seems clear that frequently the law does not only require the application of foreseeability to determine whether the defendant is negligent by taking an unreasonable risk of doing harm to a particular interest of the plaintiff which has been invaded, but also goes further and requires, in many cases where the harm results from an intervening cause, that the defendant should have been able to reasonably foresee the likelihood of that intervention. The defendant's act must have foreseeably increased the chances of the intervention of, or foreseeably produced the immediate or final cause of the consequence for which it is sought to hold him liable in a substantial portion of the cases dealt with under proximate cause.\(^4\) The defendant should not be held liable for even a probable or intended consequence produced by a cause which operates independently of his own and which he could not foresee or control, and very often he should not be held liable for consequences of an unforeseeable intervening cause which he in fact caused.\(^5\)

As to the third objection, that the causative effect of the defendant's conduct is not increased by the fact that the result was foreseeable, it may be replied that while in particular instances an act of a defendant may be a substantial factor in producing a consequence which was not

\(^3\) It is often stated that foreseeable consequences are proximate but this is not a universal truth. *Infra* Section IV, Part III, B, 2.

\(^4\) *Infra* Section II, Part III, F.

\(^5\) *Infra* Section IV, Part III, B.
foreseeable, in general and statistically, it may be said that the foreseeable ability of an act causing an occurrence increases directly with the increase of the magnitude and objective likelihood of that relation. If the conduct of the defendant is of such a character that a reasonably prudent person could foresee it would cooperate with the final intervening cause to produce the consequence which it did, it is indicative of its possession of sufficiently substantial causative attributes to treat it as a proximate cause. Foreseeability may not only be an element in determining culpability but it is a measure of the substantially causative nature of an act.36

The defendant's conduct is frequently a substantial factor in producing consequences which were not foreseeable. This is true in those cases where the defendant's act set the natural forces in motion, or stimulated animal or human beings into instinctive or something like defensive, protective or palliative action to produce the consequence in question. If no new cause intervenes between the defendant's wrong and the consequence, we have no hesitancy in pronouncing his conduct to be a substantial factor although the consequence could not have been foreseen.

If the magnitude of causative effect is what determines the existence of proximate cause it may be contended that that can be more easily measured after than before the occurrence, and therefore foreseeability should not enter into any of the rules of causation. But the answer to this contention is that whenever the question of causation is investigated, even if it is foreseeability that is used as a test, the investigation is done after the occurrence and that the ascertainment of foreseeability is apparently no more difficult than many other past facts; and besides, it is a thing for the determination of which courts have developed a technique in their handling of foreseeability in negligence cases.

The question has been raised whether foreseeability of an intervening force is to be considered as of the time of the defendant's act or from the time of the intervention. It would seem clear that as the question is whether the defendant's act was a proximate cause of the consequence, foreseeability at any later period is not a measure of the effectiveness of the defendant's act but a measure of something else and therefore the logical point at which to take foreseeability as a test is the period when defendant acts or omits his duty to act.37

36 Terry says, “Probability is not an attribute of events in themselves but of our expectation of them. It is subjective and not objective.” TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW (1884) 563, §547.

As to this statement it may be observed that it cannot be denied that probability is a subjective evaluation of objective facts, namely, a certain relationship of succession of external events. Neither can it be denied that there is a correspondence between the objective relation and the mental evaluation thereof based as it is upon past experience.

37 See discussion in McLaughlin, Proximate Cause (1925) 39 HARV. L. REV. 149, 170.
F. Substantial Factor Test

Professor Smith proposes as a test of legal or proximate cause that "The defendant's tort must have been a substantial factor in producing the damage complained of." This test has been criticized as practically worthless as a workable rule for determining proximate cause in difficult cases, and the truth of its worthlessness is exemplified in Smith's application of the test to the case where a carrier negligently delays goods in transit, and after the goods are sent on they are destroyed by an act of God, as for example, by lightning. Smith reaches the result that the carrier should be liable since it was a substantial factor in causing the result. This is a decided minority view and against the recent marked trend of the decisions. The defendant did not increase the chances of the intervention of such cause and without it the result would not have happened. The result which the courts reach, therefore, seems clearly correct. The truth seems to be this, that whether defendant's act is a substantial factor is not a test or a rule of law which may be worked or applied by the courts but is merely the descriptive statement of the essential nature of the relationship which must be found to exist between the defendant's wrong and the consequence for which it is sought to hold him liable. It is a synonym for proximate cause with helpful connotations. More specific rules of law must be laid down to make it workable.

A second criticism has been made to substantial factor as a test on the ground that it assumes that "nothing affects legal cause except the degree in which an act is a substantial factor in producing a result," that the real test of legal cause is justice rather than its materiality or substantiality as a cause. It is believed by the writer, however, that Professor Smith is precisely correct in confining legal or proximate cause to a cause which is a substantial factor in producing the result. Proximate cause is a delimitation of defendant's liability to those consequences for which the defendant's conduct is materially responsible. There are several reasons for the rule as has been previously pointed out and justice is one of them. It is practically always "just" that a defendant's liability should be limited to those consequences which his act or omission of duty was a substantial factor in causing. Professor Edgerton cites cases where the courts have held the defendant's act to have been a proximate cause where his act could not have been treated as a substantial factor in producing the same. They are the cases of alternative causes, that is "causes each of which without the concurrence

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38 Smith, op. cit. supra note 13 at 226, 229.
39 Infra Section II, Part III, F.
40 Edgerton, Legal Cause (1924) 72 U. of Pa. L. Rev. 211, 343.
of the other would have been sufficient to produce the result."41 These are not cases in which it affirmatively appears that the defendant's act was not a substantial cause in producing the consequence. If there was any cause at all, it was substantial. These cases are to be explained not upon the ground that we here have a legal or proximate cause where there is no cause in fact or where the defendant's act was not a substantial factor, but upon the ground of policy to relax in the requirement of proof of cause in fact because to do otherwise would result in frequently excusing a guilty person who had been a substantial factor in producing a consequence for which he should have been held liable if such relationship existed, because it is impossible to establish that he was a cause even though it is probable that he was.42 The problem in such cases centers about the uncertainty and impossibility of proof of cause in fact and the cases illustrate the unsatisfactory result that will be reached, namely, excusing persons who in many cases were clearly guilty, unless a relaxation in proof of cause is permitted. The reason for this relaxation is policy, rather than justice, for justice would seem to require that a person whose act was not a cause in fact should never be held liable.

Professor Edgerton cites further cases in which he thinks the defendant's act was a substantial factor and yet the courts have felt that it would be unjust to hold the defendant liable and therefore excuse him, but it is submitted that these are not cases where we can say with certainty that the defendant's act was a substantial factor. The cases he cites do constitute a valid criticism of attempting to solve the problems of proximate cause by the substantial factor formula as a rule or test. But if substantial factor is used merely as a synonym for proximate or legal cause, yet as a more adequate expression of the nature of the relationship which is required as the basis of liability than are those expressions, it is not open to objection. As courts could not take the formula, property should not be tied up or taken out of commerce, and apply it directly but can do so by means of the rule of restraint against alienation and the rule against perpetuities, so the courts cannot take the general expression, substantial factor, and apply it, but can take the more specific rules of proximate cause, which the courts have actually applied and have developed, for their guidance. But when an attempt is made to force upon the profession as the test of proximate or legal cause the answer to the inquiry whether it is just to hold the defendant liable, or not extraordinary or shocking to do so,43 the profession is being sidetracked from the fundamental issue,

41 Ibid. 344.
42 See infra Section IV, Part II.
43 Edgerton, Legal Cause (1924) 72 U. of Pa. L. Rev. 211, 343.
compelled to ignore the distinction between rules of law and the reason therefor and urged to apply indefinite standards or tests which could not but result in utter confusion and uncertainty.

G. Justly Attachable Cause Test

Justly attachable cause as the test of legal cause is the proposal of Professor Edgerton.\textsuperscript{44} The advantages claimed for this over the substantial factor test is that it allows for qualitative as well as quantitative considerations. In reality it affords no test in a large portion of the cases. In fact, it is not intended to be a definite guide for Professor Edgerton believes that definite rules as to causation are not only impossible but undesirable.\textsuperscript{45} It must be admitted that it is highly desirable in the law that no liability be unjustly imposed and that any combination of rules of law which do so, so far falls short of perfection. But justice is not in itself a good test for any rule, for in a large portion of the cases it is never clear whether one or the other result is just and in such cases the test leaves us wholly at sea, whereas rules may be perfected which will not work injustice, but will serve to make clear to persons their legal rights, reduce litigation and expedite the trial of cases. When it is clear that the application of a rule in particular instances works injustice that is persuasive ground for modifying the rule to avoid such consequence, and where there is a separable group of such instances courts usually develop a modification of the rule but do not do away with the rule entirely.\textsuperscript{46}

While the element of justice is a consideration which tends to temper all rules of law and is the basic reason of many, it has not been tortured by the courts into a definite rule of law. These theorists are the first to suggest it as a rule of law. As such it is so indefinite as to be of little or no account. While in some cases there may be agreement that a particular result is just or unjust, in the great majority of cases, its application will result merely in confusion, since minds will not agree in applying so abstract a principle.

H. Beale's System of Causation

Professor Beale's system of proximate causation of active force or active risk which would require for proximity of causation that defen-
dant's wrongful act, or failure to act, create or continue a force which "remained active itself or created another force which remained active until it directly caused the result; or have created a new active risk of being acted upon by the active force that caused the result;" is an attempt to state a more definite and workable rule for measuring the substantial character of the defendant's cause. His article contains many helpful suggestions but it uses a mechanistic terminology better fitted to the study of physics than to that of human relations, and when applied to the latter is often ambiguous and confusing. Professor Edgerton has shown the ambiguity of the words "direct" and "indirect", "active" and "passive", and that frequently either nothing turns upon this quality of the force or it brings a wrong result. Professor McLaughlin has made a noteworthy effort to rehabilitate Beale's system and expressed it in terms used by the courts. He has, however, in reality set up a system of his own. He says "We have arrived at the conclusion that there are two types of proximate causation: (1) simple active force causation; and (2) causation by independent active forces or through intervening voluntary actions the probability of whose intervention was appreciably increased by the defendant's act." Professor McLaughlin has brought us the most workable and simplified system of causation yet proposed. However, he greatly overworks "probability" and would seem clearly out of accord with the cases in refusing to treat stimulated voluntary action any differently than he does independent intervening forces, in other words according to him only those voluntary actions which are appreciably probable produce proximate consequences.

I. Extraordinary Result Test

One of the most recent tests laid down is that where a result after the event appears extraordinary it is not a proximate consequence.

The first comment to make on this is that it seems extraordinary that anyone should seriously propose it as a test. The word is one which is not used in the law beyond reference to acts of God and similar phenomena. If it constitutes any delimitation it is most confusing and uncertain. Suppose we try to apply this test to a case. A, an engineer, negligently drives his train toward a crossing over the defendant's track while the defendant's train is passing over the crossing. Defendant's engineer after clearing the crossing suddenly backs his train

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47 Beale, Proximate Consequences (1920) 33 Harv. L. Rev. 633, 658.
40 McLaughlin, Proximate Cause (1925) 39 Harv. L. Rev. 149.
and it collides with A's engine. This does not appear to be an extra-
ordinary result looking at it after the event so that A's negligence would
be treated as the proximate cause under this test but was the court
not correct in holding in that case that A's negligence was not a proxi-
mate cause of the collision since there intervened an independent, un-
foreseeable act of a third person. To make this test harmonize with
the law as laid down in the cases we would be compelled to say that
where the consequence occurred without the intervention of any new
cause nothing is extraordinary. Of course taken with other tests these
ridiculous results would often be obviated by the other tests, but left
alone it is misleading and would frequently impose liability where
there is no warrant for it in the cases. It is pure fantasy. There is
nothing in the cases to suggest it.

III. Scope of the Topic

There has been a tendency on the part of courts to overwork proxi-
mate cause. Frequently courts attempt to determine liability by means
of the formula of proximate cause when resort should have been made
to some other requisite or prerequisite of legal liability. Such cases
are not useful authorities on proximate cause.

A. Certainty of Proof

One very common practice on the part of courts is to reach the
conclusion that defendant is not to be held liable on the ground that
his act was not the proximate cause of the injury where the weakness
in the plaintiff's case is insufficient evidence to justify the inference
that defendant's act was a cause in fact of the plaintiff's injury. Thus
one distinguished writer gives the following as an example of remote-
ness of causation: "Evidence was too slight to convict of manslaughter,
where the prisoner had struck a light and lighted a candle, contrary
to ship regulations, and thrown down the lighted match, but six hours
elapsed without sign of fire by sight or smell." Professor Jeremiah
Smith points out that "the decision referred to does not proceed upon
the ground that the defendant's act was too remote an antecedent. It
is based upon the ground that there was not sufficient evidence to show
that it was a causation antecedent at all."

50 Kansas City, Memphis & Birmingham R. R. Co. v. Lackey (1896) 114
Ala. 152, 21 So. 444.
51 Dean Leon Green has rendered an important service in his emphasis on the
use of the other requisites of legal liability though we feel he has gone too far
in concluding that there is no problem that should be treated under the head of
proximate cause. GREEN, RATIONALE OF PROXIMATE CAUSE (1927).
52 CLARKE, ANALYSIS OF CRIMINAL LIABILITY, 17, note 22.
53 SELECTED ESSAYS IN LAW OF TORTS (1924) 672, Smith, op cit. supra note 13.
For other examples of this confusion see Section III, Part II, infra, dealing with
Proof of Cause in Fact.
In *Nirdlinger v. American District Telegraph Co.*, the defendant company installed an automatic burglar alarm system in the plaintiff’s home and undertook to protect the plaintiff from burglarious entry by the dispatch of guards thereto when warned by the automatic signal. It clearly appears that the defendant’s servant was negligent in not resetting the burglar alarm after a certain occasion. The plaintiff’s home was entered while the system was not in operation and a quantity of goods was stolen. Plaintiff sought to hold the defendant liable for value of goods stolen and the court held defendant was not liable, for its negligence was not the proximate cause of the loss sustained by the plaintiff because the proximate cause of the loss was the felonious entry of the dwelling. The court adds that there is no inference that the loss would have been averted had the electrical alarm been in good order. It is obvious that the real difficulty in the case is that it is not clear that had the alarm been in working order it would have prevented the injury. If the evidence had been sufficient to warrant that inference there could have been no basis for excusing the defendants on the ground that their failure to have the alarm in working order was not the proximate cause of the injury.

This same practice is illustrated again by *Martino v. Rotondi* where the plaintiff alleged that the defendant negligently piled a quantity of lumber on his city lot and without the defendant’s knowledge a number of children in the vicinity rearranged the boards and began playing on the pile of lumber, that while the plaintiff’s decedent, a child of tender years, was walking beside the pile, a large piece rolled down from the top and crushed her to death. In plaintiff’s action for wrongful death, it was held, that granting that the lumber was negligently piled, it is clearly shown that the injury was caused by the interference by an outside agency for which the defendant was in no manner responsible, namely, the act of the children in rearranging the lumber pile. The court concluded that the proximate cause of the injury is the act of the children. The weakness in the plaintiff’s case was that it did not appear that the negligent piling of the lumber by the defendant was a cause in fact of the injury. The children might have rearranged the boards as they did even if the defendant had piled them carefully.

In *Carter v. Atlantic Coast Line Ry. Co.*, the plaintiff, engaged in interstate commerce, brought action for personal injuries under the federal act. It appeared that the plaintiff was employed as a station master by the defendant’s railroad, and was assaulted by an unknown
third person. On the night of the assault, defendant had failed to pro-
vide sufficient light while the plaintiff was performing his duties about
the station yards. His assailant approached in the dark and struck him
over the head. The blow crushed his skull and left him in a seriously
and permanently injured condition. The defendant was held not liable
upon the ground that his failure to provide sufficient lighting was not
the proximate cause of plaintiff's injury. The court said, "The want of
light was really a condition which might or might not influence the
intervening independent acts of the robber over whom the defendant
had no control. Such an injury was neither the natural or probable
consequence of the defendant's failure to provide sufficient light." It is
apparent here that the plaintiff failed in his proof of a cause in fact
relation between the failure to provide lights and the plaintiff's injury.

In Strong v. Granite Furniture Co.,57 the plaintiff had purchased some
furniture from the defendant and under the contract, upon the failure
of the plaintiff to make payments, defendant entered the plaintiff's house
by removing a pane of glass from the window and removed the furniture
without replacing the glass or fastening the window. A burglar entered
and carried away some personal property for the value of which plain-
tiff now sues the defendant. There was no evidence that the burglars
entered by the window or would have been deterred had the window
not been open. The court said that the defendant should not be held
liable because leaving the window open was not the proximate cause
of the loss. Again the real weakness of the plaintiff's case is the lack
of evidence to show that the negligent act of the defendant had any
cause in fact relation to the burglary. To discuss the question of
proximate cause in such cases merely makes for confusion.

There are several cases where a defendant conspired with a debtor
and took a fictitious mortgage or bill of sale and secreted the property
so that creditors could not reach it wherein it was held the defendant
would not be liable to general creditors of the debtor because the dam-
ages were too remote. Again it is not remoteness of damages but lack
of evidence from which it can be inferred that any damage was actually
caused by the defendant's act.58 Where a defendant by misrepresentation
causes a testator to change a will devising property to the plaintiff,
plaintiff is sometimes denied recovery on the ground that the loss by

57 (Utah, 1930) 294 Pac. 303.
113 U. S. 104, 5 Sup. Ct. 401; Austin v. Barrows (1874) 41 Conn. 287; Moody v.
Burton (1847) 27 Maine 427; Lamb v. Stone (1831) 11 Pick. (Mass.) 526; Wellington
Contra: Penrod v. Mitchell (1822) 8 Serg. & R. (Pa.) 522; Collins v. Cronin
(1887) 117 Pa. 35.
the plaintiff, of his devise, is too remote whereas the real difficulty in plaintiff's case is a lack of evidence establishing that defendant's act was the cause of any damage to the plaintiff.  

B. The Interest Not Legally Protected

Sometimes where the interest of the plaintiff invaded by the wrongful act of the defendant is one which the law does not protect either at all or only from intentional or purposed invasion the courts say the consequences are too remote. Thus courts generally refuse to protect the plaintiff's interest in freedom from disagreeable emotions at all and his interest in freedom to enter into contract relations from negligent invasions. The refusal of the courts of Massachusetts, New York, Pennsylvania, Minnesota and some other states to allow recovery for bodily injuries caused by negligent act where there is no impact and the injury results from fright or other mental emotion exhibits a tendency to lay down a rule of law of remoteness of causation which does not correspond to the facts. If such a rule is to exist it should be based upon administrative expediency, i.e., the general unreliability of the proof of cause in fact in such cases. If this is treated as a question, which it is, of proof of cause in fact, more satisfactory rules of law will be evolved as human knowledge grows to cope with the difficulty. The strong tendency of the courts to establish no rule of law which excludes recovery in such cases seems sound.  

C. Defendant Not Negligent

Very often courts excuse the defendant from liability on the ground that his act was not a proximate cause of the injury when the proper basis of decision should have been that the defendant was not guilty of negligence. For example, in Berman v. Schulitz, the defendant properly parked his electric truck, turned off the electric current and firmly applied the brake so that it could not start of its own accord. The car was unattended for a few moments and during this time two boys pulled the starting lever, causing the automobile to run down the street with increasing speed. The truck then collided with the plaintiff's horse and wagon, causing damages for which the plaintiff brings this action. It was held, the defendant was not liable, for the proximate

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See also cases collected under Proximate Cause in Note (1930) 69 A. L. R. 1151 which are cases where the problem is one of certainty of proof.

61 Buckham v. Great Northern Ry. Co. (1899) 76 Minn. 373; SELECTED ESSAYS ON THE LAW OF TORTS (1924) 311; Throckmorton, Damages for Frights (1921) 34 Harv. L. Rev. 260.


63 (1903) 81 N. Y. Supp. 647.
cause of the injury was the intervening act of the boys in starting the
automobile. The court was not called upon to discuss proximate cause
for there was nothing to indicate the defendant was negligent. If the
defendant had been negligent, because it would appear to a reasonable
man that there was an undue risk of persons starting the car under the
circumstances, clearly he could not escape liability on the ground
that his negligence was not a proximate cause of the plaintiff's injury.

In Barton v. Pepin County Agricultural Society,63 the defendant held
a fair on its fair grounds and after the races were over it permitted private
persons to drive their teams on the track. A driver of a team of young
horses was driving around the track when the horses began to run.
He foolishly whipped them which caused them to run away and get
out of his control. They ran into and injured the plaintiff who was near
the track on her way out of the fair grounds. It was held for the
defendant, as the only cause of the injury was the whipping of the
horses causing them to run away, and not the defendant's allowing per-
sons to drive around the track. It seems apparent that defendant should
escape liability on the ground that it was not guilty of negligence. Had
it been guilty of negligence toward the plaintiff or persons of his class it
should not have escaped liability on the ground of the absence of
proximate cause.

In Jones v. City of Fort Dodge,64 the owner of a building in the
defendant city, during the course of reconstruction, had placed a
temporary obstruction on the sidewalk abutting the building. The
defendant city permitted such obstructions, although permission from
the city council had not been obtained by the building owner. Plain-
tiff's decedent, a boy of 7 years, was killed by an automobile while he
was walking around this obstruction. The street at this place was sixty-
three feet in width and at the time of the accident there was no vehicle
on the street, except the automobile in question. The court held the
defendant city was not liable because the obstruction, if illegal, was not
the proximate cause of the death as the act of the automobile driver
must be deemed to be the independent cause of the accident. It seems
obvious that if the defendant is to escape liability it should be on the
ground that it was not taking an unreasonable risk in allowing this
temporary obstruction. If it was taking an unreasonable risk it would
have been the risk of such intervening acts as occurred here to cause
the plaintiff damage and the defendant should have been held liable.

D. Conduct Not Wrongful as to the Plaintiff or as to the Interest
Invaded

63 (1892) 83 Wis. 19, 52 N. W. 1129.
64 (1919) 185 Ia. 600, 171 N. W. 16.
RULES FOR DETERMINING PROXIMATE CAUSE

Frequently courts exempt a defendant from liability on the ground that the consequence was too remote when there was no wrongful conduct toward the plaintiff or his class or to the species of interest invaded.\(^65\) Thus in Hoag v. Lake Shore and Michigan Southern R. Co.,\(^66\) where the defendant's servant ran its train, which included cars loaded with crude oil in bulk, into some earth that had recently slid onto the track and upset the tender and piled up several cars of oil which burst, causing the oil which took fire to flow several hundred feet down a creek, swollen with rain, and to set fire and consume the plaintiff's property, the court treated the question raised as one of proximate cause and ruled that, as a matter of law, proximate cause did not exist. There were no intervening causes between defendant's negligent act and the consequent loss to the plaintiff. That defendant's negligence was the substantial cause, there being no other later cause, seems too clear for argument. The court's statements as to proximate cause are inconsistent with other subsequent cases in the same jurisdiction.\(^67\) It is obvious, however, that the result is correct, but it should have been reached on the ground that there was no negligence toward the plaintiff's interest.

In Donald v. Long Branch Coal Co.,\(^68\) the defendant coal mining company operated a short railroad line. The plaintiff, a child of 13, who was accustomed to go from her house down the track to get coal for domestic use deposited for that purpose by the defendant, while going down the road saw the defendant's engine and coal cars coming and sat down on a log three or four feet from the edge of the bank, which was considerably above the track, and waited for the cars to pass. Seeing one of the cars off the track and bumping on the ties, she became frightened, and in her effort to get away from the track, fell and rolled down the bank to a point where the derailed car hit her. It was held that neither the negligence of the defendant, in failing to maintain a safe track at the curve, nor the failure of the engineer to observe the plaintiff, before passing her, was the proximate cause of her injury. They were too remote. Her fright at the derailed car, and her effort to get away to a place of safety was an intervening act, constituting a proximate cause. Such intervening act could not reason-


\(^{66}\) (1877) 85 Pa. 293.

\(^{67}\) See Oil City Gas Co. v. Robinson (1881) 99 Pa. 1; Bunting v. Hogsett (1891) 139 Pa. 363, 374, 21 Atl. 31, 32.

\(^{68}\) (1920) 86 W. Va. 249, 103 S. E. 55.
ably have been anticipated from the failure to maintain a safe track at the curve. This case while therefore probably correct as to proximate cause clearly is one where there was no wrong toward the plaintiff.

In *Wood v. Pennsylvania Ry. Co.*, the plaintiff was standing on defendant's railroad platform awaiting defendant's train. Defendant's train approached a road crossing fifty feet away at the rate of some fifty to sixty miles per hour. The evidence discloses that no bell was rung or whistle blown as the train approached this crossing. The defendant's engine struck a woman at this crossing and threw her body to the platform where the plaintiff was standing. The body struck the plaintiff causing the injuries complained of. It was held that the plaintiff could not recover, for the defendant's negligence in failing to give a signal at the railroad crossing could not be held the proximate cause of the injuries resulting to the plaintiff. The court said the injuries to the plaintiff were not the natural and probable consequence of the defendant's negligence to give the warning and therefore were not those which it was bound to foresee. As a further ground of non-liability, the court states that the sole cause of the injuries was not the negligence of the defendant, but the negligence of the deceased person. It is apparent that the court should have found proximate cause without difficulty. If it was negligent in hitting the woman it is responsible for starting a force in operation which without interruption or the intervention of any new force proceeded to injure the plaintiff. If the defendant is to escape liability it should be on the ground of no negligence toward the plaintiff.

The recent case of *Palsgraf v. Long Island R. Co.* deserves comment because it is an excellent example of what courts ought to do in such cases. The facts were that the defendant's servant, in helping a passenger on to a car, negligently caused him to drop a package containing fireworks which exploded and caused scales hanging at the end of the platform to fall and injure the plaintiff. Judge Cardozo, who wrote the majority opinion, did the unusual thing in pointing out that the question of proximate cause was not a problem in the case, and placed the decision squarely on the ground that the defendant was not negligent toward the plaintiff who did "not come within the zone of apprehended danger."

It is interesting to contrast with the *Palsgraf* case, *Smith v. London & South Western Ry. Co.* In that case, grass had been left in small piles along the right of way during a dry season and these were set on fire by the

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71 (1870) L. R. 6 C. P. 14.
operation of the defendant's engine. It seemed to the court that no reasonable man could have foreseen that the fire would spread, consume a hedge, cross a stubble field and a road and get to the plaintiff's cottage 200 yards away. But the court held that fact made no difference; since the defendant was negligent to some one it was liable for the natural consequences which followed. It is submitted the court was correct in not excluding liability upon the ground that the defendant's act was not a proximate cause of the burning of the plaintiff's cottage. The *Palsgraf* case is not in disagreement on the question of cause. The explanation of the difference in the results reached by the New York and English courts is that the English court adheres to the view commonly entertained that the English law does not require, as does the New York law, that the defendant be negligent toward the interest invaded, but negligence in general is sufficient.

There was no call to resort to "proximate cause" in *Falk v. Finkelman*\(^72\) where the defendant, in violation of an ordinance, parked his car on the wrong side of the street and the car, while parked there, was struck by a fire apparatus and pushed onto the sidewalk and injured a pedestrian. It seems clear that the defendant violated no duty to the pedestrian in parking his car on the wrong side of the street. He was not negligent with respect to him in so doing.

E. Injury Resulting from an Unforeseeable Hazard

Often defendant will escape liability for injuries caused by his wrongful act where the wrong consists in exposing the plaintiff or persons of his class to injury from a particular hazard and the injury occurs from another hazard. Not infrequently courts say defendant escapes liability in such case because his wrong was not a proximate cause of the injury. This is not an inappropriate explanation since the matter pertains to the causal relation of fault to consequence. However, in the Restatement of Torts this is treated under the head of negligence.\(^73\) In *Teis v. Smuggler Mining Co.*,\(^74\) the defendant was a mine operator, and the plaintiff was an employee in the mine. The defendant negligently permitted gas in dangerous quantities to escape into the mine. The plaintiff, working in the mine, was overcome by the gas, and became unconscious. His fellow-workmen put him into the elevator for the purpose of taking him to the top. In so doing, they negligently placed him so that one of his legs was sticking over the edge. The leg caught on the edge of the mine shaft on the way up and was broken. Plaintiff now sues the defendant for the broken leg. It was

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\(^{72}\) (1929) 268 Mass. 524, 168 N. E. 89.

\(^{73}\) Restatement of the Law of Torts (Am. L. Inst. 1929) §165, comment (e).

\(^{74}\) (C. C. A. 8th, 1907) 158 Fed. 260.
held that the defendant was not liable because he could not have foreseen that his negligence in allowing the gas to escape would result in broken legs to its employees.

F. No Breach of Duty

Oftentimes courts talk of proximate consequence when there was no breach of duty. In *Howard v. Redden*, where the complaint was against the owner and the contractor of a building for causing a pedestrian's death by the fall of a cornice, which fell only after the wood had rotted and the nails had rusted. The court held the complaint did not state a cause of action against the contractor for the proximate cause of the accident was not the negligence of the contractor, but the failure of the owner to inspect and prevent the fall due to the rusting and rotting. It is apparent that the court should have been more concerned with the question whether the contractor violated a duty to the pedestrian. If there was a duty violated the court should have experienced no difficulty in finding proximate cause.

In *Missouri, Kansas & Texas Ry. Co. v. Merrill*, where a railway company negligently delivered a defective freight car to a connecting line and an employee of the latter was injured by reason of such defects, the court held the defendant railway company not liable because the negligence of this intervening company "severed the causal connection." The reason given is a resort to the discredited last wrongdoer rule, but it is obvious that the absence of liability might properly, under the precedents, have been placed on the absence of duty to use due care towards the employees of the latter company.

G. Contributory Negligence

In many cases in which the plaintiff is barred by his contributory negligence, it is stated that the reason for this is that the plaintiff's wrongful intervening act is the proximate cause and that the defendant's therefore cannot be. But it is obvious that these statements, that since the plaintiff's negligence is a proximate cause the defendant's cannot be, are not in accord with the great body of authority which holds the defendant responsible for the consequences of foreseeable

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75 (1919) 93 Conn. 604, 107 Atl. 509.
76 (1902) 65 Kan. 436, 70 Pac. 358.

For an example of this confusion see Bank of Savings v. Murphey (1886) 68 Cal. 455, 9 Pac. 843; Studer v. Southern Pacific Co. (1898) 121 Cal. 400, 53 Pac. 942.

For a case free from this confusion see Griffith v. Oak Ridge Oil Co. (1923) 190 Cal. 389, 212 Pac. 913.
intervening acts of wrongdoers. Bohlen has shown that the doctrine of contributory negligence cannot rest upon the rules governing proximity of causation.\textsuperscript{79}

The facts and the holding of the court in \textit{Cordiner v. Los Angeles Traction Co.}\textsuperscript{80} demonstrate the falsity of this idea that the plaintiff is barred from recovery in cases of contributory negligence because his act was, and the defendant's was not, the proximate cause of the plaintiff's damage. In that case the plaintiff was injured by a collision resulting from the concurring negligence of two street railway companies and the court held that plaintiff could recover from either one of them, although neither of them could recover from the other by reason of its contributory negligence.

H. Assumption of Risk

Occasionally courts excuse the defendant from liability on the ground that the defendant's wrong was not a proximate cause, when the proper ground would have been that the plaintiff is barred by reason of his assumption of risk. In \textit{The San Onofre}\textsuperscript{81} a collision occurred between the \textit{San Onofre} and \textit{M} as a result of the negligence of \textit{M} exclusively. The \textit{M} was seriously damaged and the \textit{San Onofre} attempted to tow \textit{M} to shallow water but without negligence both vessels were grounded. It was held that the loss from stranding could not be included as a part of \textit{San Onofre}'s loss resulting from the collision for the collision was not the proximate cause of the stranding. This was a reasonable effort on the part of the \textit{San Onofre} to rescue the \textit{M} or to mitigate damages and the consequences of that act should and generally would be treated as proximate.\textsuperscript{82} If the plaintiff was to be denied recovery it should have been on the ground of assumption of risk.\textsuperscript{83}

This tendency on the part of courts to dump everything that cannot be easily resolved by known rules of law into the capacious maw of proximate cause has brought a reaction on the part of legal scholars trying to bring orderliness into this field of the law. Some have gone to the extreme and attempted to make out that there are no problems which should be resolved under this “network of proximate cause.” Dean Leon Green would make no delimitations on liability under the head of legal or proximate cause. His solvent is the formula, “Whether protection against a certain risk or hazard is within the purpose of the

\textsuperscript{79} \textit{Studies in the Law of Torts} (1926) 501, 511.
\textsuperscript{80} See also \textit{Payne v. Chicago & Alton Ry. Co.} (1895) 129 Mo. 405, 31 S. W. 885.
\textsuperscript{81} (1907) 5 Cal. App. 460, 91 Pac. 436.
\textsuperscript{82} [1922] P. 243.
\textsuperscript{83} \textit{Infra} Section IV, C, 4, c and d.
\textsuperscript{83} See Note (1923) 36 Harv. L. Rev. 486.
rule which the plaintiff relies on." Instead of relying on it he says, "the courts go chasing about to find whether the hazard was produced by an 'intervening agency' which broke the 'chain of causation' or whether it was a mere 'stage' etc. The real problem is made to await the determination of an immaterial as well as a fantastic side issue." Undoubtedly we have many cases treated under the head of proximate cause which could be resolved by Dean Green's formula. This is particularly true where we have a statute designed to protect an interest against a particular hazard and the injury results from a different hazard; as where, for instance, a statute requires shippers to provide pens for animals shipped to prevent spread of disease, and animals are lost not through sickness but through a storm because pens were not provided. But the cases are legion where we have a rule clearly meant to protect the plaintiff or persons of his class against the hazard from which his injury resulted, and yet the defendant escapes because the courts have felt that no proper causal connection exists between the defendant's act and the injury, and it is not clear that these cases do not reach desirable results.

Professor Smith would limit the defendant's liability, beyond cause in fact, but he would confine legal cause, i.e. proximate cause, to a consideration of the degree of causative effect of the defendant's conduct. The defendant's wrong must have been a substantial factor in producing the consequence for which it is sought to hold him liable. Professors Beale and McLaughlin have agreed with Smith that the proximate cause should be a substantial factor. The writer of this work agrees with these writers in confining proximate cause to a consideration of matters that relate to cause in its primary meaning. Substantial factor expresses the essence of what is sought to be found as the relationship existing between the defendant's wrong and the consequence even better than the more indefinite phrase proximate or legal cause. When the courts and legal writers refuse to confine proximate cause to a consideration of the substantiality of the defendant's contribution, but include elements of culpability of the parties involved, fairness between the parties, justice, expediency, and policy, the whole problem becomes

84 Green, Rationale of Proximate Cause (1927) 143.
85 Infra Section V, Part II.
86 Infra Section V, Part II. There is another flaw with this formula of Dean Green's as a statement of existing law. It is well to observe that courts do not impose the limitations he suggests where the injury results from an existing condition. For example, in In re Polemis and Furness, Withy & Co., Ltd. [1921] 3 K. B. 560, where one of the defendant's servants negligently dropped a piece of timber into the hold which struck a spark which ignited benzine fumes and caused the vessel to burn, the court held the defendant not liable. On the other hand, if the injury results from an unexpected, intervening hazard the courts refuse to impose liability.
muddled and insoluble.\textsuperscript{87} Of course, it must not be forgotten that the reasons for the requirement that the tort-feasor's act must have been a substantial factor in producing the consequences for which it is sought to hold him liable, are justice, fairness, expediency and policy. If the many problems of intrinsic difficulty pertaining to the causative relation are segregated from other topics and treated under the head of proximate cause, such treatment will not only be more in accord with the development the problems have had in the law but, it is submitted, is likely to lead to the more careful and minute study which is required for the development of just, definite and scientific rules.

In the writer's opinion, the courts have not only been logical but wise in segregating all of those factors which have a bearing on the causative effect of the defendant's conduct such as concurring causes, remoteness in space and time, the effect of intervening omissions, of checking forces, of the relation of fault to consequence, of the effect of intervening independent and dependent causes, of intervening instinctive and automatic acts of animals and human beings and of deliberate acts of human beings, and treating them under the head of causation. This is certainly better than to apply the very general and indefinite test: "whether protection against a certain risk or hazard is within the purposes of the rule which the plaintiff relies on"; or whether it is just or not extraordinary to impose liability; or to attempt to resolve the difficulty under the rules of negligence or duty. It is believed, too, that the rules which the courts have worked out are more satisfactory from every point of view than many of these legal theorists would lead us to believe.

\textit{IV. Limitations on the Application of the Rules Hereinafter Proposed}

The confusion and contradiction as to proximate cause in judicial opinion are great. But recent writers have much exaggerated this, at least so far as the actual decisions are concerned. The courts have often reached satisfactory results while giving most unsatisfactory reasons. Their intuitive judgment for correct results has outrun their powers of rationalization. As Pound has said, "The trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons."\textsuperscript{88} The writer submits this article as a serious attempt, without imposing a preconceived theory, to restate, in consistent and workable form the principles which he conceives are

\begin{footnotesize}

\textsuperscript{88} Pound, \textit{The Theory of Judicial Decisions} (1923) 36 Harv. L. Rev. 940, 951.
\end{footnotesize}
actually found in the decisions. No attempt has been made to reconcile cases, but excepting out the cases decided upon admittedly erroneous theory or discarded tests of causation, as for instance, that there is a universal rule of no liability for improbable consequences, or that consequences which result from the acts of an intervening wrongdoer are not proximate, or other objectionable rules, the rules and principles hereinafter set out accord fairly well, it is believed, with the actual decisions. The system of rules herein proposed does not apply to damages resulting from breach of contract where liability on sound principles, it seems, should be confined to damages contemplated by the parties, or to liability for violation of statutes in those instances where it is apparent that the intention of the legislature was to apply a different rule for the determination of causal relation than that of the common law. For instance, a statute may forbid the procurement of sales of obscene books. In such case it is apparent that causing the sale of obscene books would not necessarily constitute a violation of the statute.

V. Other Requisites of Legal Liability

It is assumed throughout the subsequent discussion that the following elements for legal liability are required:

First, an act or an omission by the defendant personally, or by some person for whom the law holds him responsible.

Second, an invasion of the plaintiff's interest.

Third, an interest which the law protects against the species of conduct by which it was invaded.

Fourth, the act or the omission in intentional and negligent torts and the invasion in unintentional and non-negligent torts must have been wrongful to the person injured or the class to which he belongs, or to the species of interest invaded, excepting the cases of intentional invasions where the doctrine of transfer of intent is applicable.

Fifth, in case of unintended wrongs or violations of statute, where the wrong consists in subjecting an interest to a particular hazard, liability is limited to the harm which results from such hazard.

Sixth, the invasion of plaintiff's interest must have been a breach of duty to the plaintiff.

89 Hadley v. Baxendale (1854) 9 Ex. 341; Humphreys v. Pictou County Power Board [1931] D. L. R. 571; Winfield, Province of the Law of Torts (1930) 41; Bohlen, The Probable or the Natural Consequence As the Test of Liability in Negligence (1901) 40 Am. L. Reg. 80, 82; Smith, op. cit. supra note 13 at 126.


Seventh, the plaintiff must not have defeated his right or have disabled himself from bringing an action by his own conduct.

Eighth, the consequences must have in fact resulted from the defendant's act or omission.

Ninth, the consequences must have been the legal or proximate result of the defendant's wrong.

This article deals with the eighth and ninth requisites particularly.

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(TO BE CONTINUED)