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# Mixing Oil and Water: Reconciling the Substantial Factor and Result-within-the-Risk Approaches to Proximate Cause

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# MIXING OIL AND WATER: RECONCILING THE SUBSTANTIAL FACTOR AND RESULT-WITHIN-THE-RISK APPROACHES TO PROXIMATE CAUSE

PETER ZABLOTSKY\*

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## I. INTRODUCTION

For over a century, the common law of negligence has required that, before liability can be imposed, a relationship exist between the breach of duty by the defendant and the harm suffered by the plaintiff.<sup>1</sup> Essentially, this is a policy decision—a recognition that liability cannot be open ended and should be limited to conduct that played a sufficiently important role in causing the harm suffered.<sup>2</sup> The element of the negligence action charged with embodying and effectuating this concept is “proximate cause.”<sup>3</sup> But while it is universally recognized that proximate

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<sup>1</sup>W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 263 (5th ed. 1984).

<sup>2</sup>These policy considerations include: the practical necessity of limiting liability so as not to impose an undue burden on the responsible party; the need to construct a system that is both feasible to administer and predictable in result; the desirability of favoring or disfavoring certain types of classes of defendants; the desirability of favoring or disfavoring certain defenses; the desirability of spreading economic loss; and the desirability of accident deterrence. 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS 131-32 (2d ed. 1986).

<sup>3</sup>The term “proximate cause” is not the only term used to describe the concept under discussion; “legal cause” is also used. See, e.g., RESTATEMENT (SECOND) OF TORTS § 431

cause is a necessary element of a negligence action, historically there has been little agreement on how the term should be defined or even conceptualized.<sup>4</sup>

This began to change in the mid-twentieth century when the myriad definitions of proximate cause began to coalesce around the foreseeability based conceptualization of result-within-the-risk.<sup>5</sup> Just as a consensus began to emerge among courts and commentators, however, the Restatement of Torts adopted the substantial factor test—a view of proximate cause that focused on significance, as opposed to foreseeability.<sup>6</sup> Swift and harsh condemnation of the substantial factor test and its corresponding minimizing of foreseeability came from many corners.<sup>7</sup> Nonetheless, the substantial factor formulation of proximate cause took root,<sup>8</sup> and from the mid-twentieth century on, it seemed as if American jurisprudence would be burdened with two dueling, irreconcilable versions of proximate cause—the foreseeability based result-within-the-risk version on the one hand, and the significance based substantial factor version on the other.<sup>9</sup>

Most recently, however, the courts—the entities mandated to apply proximate cause during the course of the analysis of liability for negligence—appear to have brokered a peace between the dueling conceptualizations of proximate cause. As applied, the proximate cause analysis grounded in substantial factor appears to be

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(1965). However, for the reasons set forth below, this Article employs the term proximate cause:

The term “proximate cause” is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established. . . . It is an unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness. For this reason “legal cause” or perhaps even “responsible cause” would be a more appropriate term. There is, however, no present prospect that long ingrained practice will ever be altered by substitution of either.

KEETON ET AL., *supra* note 1, at 273.

<sup>4</sup>Prosser states:

An essential element of the plaintiff’s cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called “proximate cause,” or “legal cause.”

KEETON ET AL., *supra* note 1, at 263 (citing a plethora of seminal authority ranging, chronologically, from Francis H. Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 49 AM. LAW REG. 79 (1901), to E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1 (1977)).

<sup>5</sup>See *infra* notes 11-44 and accompanying text.

<sup>6</sup>See *infra* notes 45-63 and accompanying text.

<sup>7</sup>See *infra* notes 81-91 and accompanying text.

<sup>8</sup>See *infra* notes 81-83 and accompanying text.

<sup>9</sup>See, e.g., D.E. Buckner, Annotation, *Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d 942 § 1 (1965).

yielding the same results with respect to liability as the proximate cause analysis grounded in foreseeability.<sup>10</sup>

It is the thesis of this Article that such a peace has, in fact, been brokered; whether approached from the means of substantial factor or result-within-the-risk, the end is the finding of common ground for the purpose of the proximate cause analysis. This Article first summarizes and analyzes the foreseeability based result-within-the-risk approach to proximate cause. Next, the Article summarizes and analyzes the substantial factor test. Finally, the Article explains and analyzes the common ground that appears to have emerged between the two disparate approaches.

## II. THE FORESEEABILITY BASED FORMULATION OF PROXIMATE CAUSE: RESULT-WITHIN-THE-RISK

### A. Background

Historically, nothing has been more critical to the formulation of the negligence action than the notion of foreseeability.<sup>11</sup> Foreseeability affects the scope of the duty owed at the outset<sup>12</sup> and the liability for the resulting consequences at the conclusion. It is the latter notion—the notion that an actor’s liability for negligence is limited by the degree of the foreseeability of the consequences—that the term proximate cause embodies.<sup>13</sup>

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<sup>10</sup>See sources cited *infra* notes 92-139 and accompanying text.

<sup>11</sup>See, e.g., 4 HARPER ET AL., *supra* note 2, at 133; KEETON ET AL., *supra* note 1, at 280.

<sup>12</sup>For discussions of the relationship of duty to proximate cause, and how the concept of duty can theoretically subsume the concept and limits potentially embodied in the notion of proximate cause, see, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 249-51 (2000), 4 HARPER ET AL., *supra* note 2, at 138-39; and KEETON ET AL., *supra* note 1, at 274-75 (“It is quite possible to state every question which arises in connection with ‘proximate cause’ in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?”).

<sup>13</sup>On this point, Prosser writes: “There is perhaps no other one issue in the law of torts over which so much controversy has raged, and concerning which there has been so great a deluge of legal writing.” KEETON ET AL., *supra* note 1, at 280 (citing KEETON ET AL., *supra* note 1, at 263 n.1; R.W.M. Dias, *The Duty Problem in Negligence*, 13 CAMBRIDGE L.J. 198 (1955); R.W.M. Dias, *The Breach Problem and the Duty of Care*, 30 TUL. L. REV. 377 (1956); John G. Fleming, *The Passing of Polemis*, 39 CAN. BAR REV. 489 (1961); A.L. Goodhart, *The Imaginary Necktie and the Rule in Re Polemis*, 68 L.Q. REV. 514 (1952); A.L. Goodhart, *Liability and Compensation*, 76 L.Q. REV. 567 (1960); Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); Douglas Payne, *The “Direct” Consequences of a Negligent Act*, 5 CURRENT LEG. PROB. 189 (1952); Douglas Payne, *Foreseeability and Remoteness of Damage in Negligence*, 25 MOD. L. REV. 1 (1962); Glanville Williams, *The Risk Principle*, 77 L. Q. REV. 179 (1961); Wilson and Slade, *A Re-examination of Remoteness*, 15 MOD. L. REV. 458 (1952); Lord Wright, *Re Polemis*, 14 MOD. L. REV. 393 (1951); LEON GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927); Francis Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 49 AM. L. REG. 79, 148 (1901); Joseph Walter Bingham, *Some Suggestions Concerning “Legal Cause” at Common Law*, 9 COLUM. L. REV. 16, 136 (1909); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 102, 233 (1911); Joseph Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Leon Green, *Are Negligence and “Proximate” Cause Determined by the Same Test*, 1 TEX. L. REV. 224, 423 (1923); A. McLaughlin, *Proximate*

In summing up the development of the relationship between foreseeability, negligence, and the liability for its consequences, Harper, James and Gray rely upon the writings of Holdsworth and Pollock.<sup>14</sup> According to Holdsworth, the proximate cause question that needed to be resolved was “whether any ordinarily prudent man would have foreseen that damage would probably result from his act.”<sup>15</sup> According to Pollock, the question was whether the damage caused by a defendant’s negligence was “such as the defendant could reasonably be expected to anticipate.”<sup>16</sup>

The most successful approach to proximate cause to emerge from these historical underpinnings is the result-within-the-risk approach. Stated generally, this approach to proximate cause “holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct.”<sup>17</sup> More specifically, result-within-the-risk compares the risk that made the defendant’s conduct a breach of duty to three aspects of the ensuing result—person, type, and manner. Most specifically, person, or person-within-the-risk, focuses on whether the person who was ultimately injured by the defendant’s negligence was a foreseeable subject of the risk that made the defendant’s conduct a breach of duty to begin with. Type, or type-within-the-risk, focuses on whether the type of injury ultimately inflicted by the defendant’s negligence was a foreseeable kind of harm threatened from the risk that made the defendant’s conduct a breach of duty to begin with. Finally, and perhaps most

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*Cause*, 39 HARV. L. REV. 149 (1925); Leon Green, *Are There Dependable Rules of Causation*, 77 U. PA. L. REV. 601 (1929); Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CAL. L. REV. 229, 396, 471 (1932); William Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19 (1936); Richard V. Campbell, *Duty, Fault and Legal Cause*, 1938 WIS. L. REV. 402 (1938); Charles Gregory, *Proximate Cause in Negligence – A Retreat from Rationalization*, 6 U. CHI. L. REV. 36 (1938); Charles E. Carpenter, *Proximate Cause*, 14 S. CAL. L. REV. 1, 115, 416 (1940); Charles E. Carpenter, *Proximate Cause*, 15 S. CAL. L. REV. 187, 304, 427 (1942); Charles E. Carpenter, *Proximate Cause*, 16 S. CAL. L. REV. 1, 61, 275 (1942); Herbert Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185 (1950); Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 71, 621, 755 (1950); William Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369 (1950); Fleming James, Jr. and Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761 (1951); John Sherman Myers, *Causation and Common Sense*, 5 U. MIAMI L.Q. 238 (1951); Clarence Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189 (1952); Roscoe Pound, *Causation*, 67 YALE L.J. 1 (1957); Glanville Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62; Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); R. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963); H.L.A. Hart, *Varieties of Legal Responsibility*, 83 L.Q. REV. 346 (1967); E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1 (1977).

This article does not wish to add to the deluge. Rather, the article seeks to summarize aspects of the concept of foreseeability based proximate cause only to the extent necessary to compare them to the substantial factor approach to proximate cause, *infra*.

<sup>14</sup>HARPER ET AL., *supra* note 2, at 133.

<sup>15</sup>*Id.* (quoting 8 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 450 (2d ed. 1937)).

<sup>16</sup>*Id.* at 133-34 (quoting SIR FREDERICK POLLOCK, *THE LAW OF TORTS* 24 (15th ed. 1951)).

<sup>17</sup>DOBBS, *supra* note 12, at 444.

significantly, manner. or manner-within-the-risk, focuses on whether the way the injury was ultimately inflicted by the defendant's negligence was a foreseeable way of inflicting an injury created by the risk that made the defendant's conduct a breach of duty to begin with.<sup>18</sup>

*B. Person-Within-the-Risk*

The seminal case regarding person-within-the-risk is *Palsgraf v. Long Island Rail Company*.<sup>19</sup> Mrs. Palsgraf, the plaintiff, was standing on the defendant's railroad platform. While she was waiting, a train began to leave the station, and a man, carrying a package wrapped in newspaper, jumped aboard. As guards on the train attempted to steady him, the package the man was carrying fell onto the tracks. The package, which contained fireworks, exploded. The shock from the explosion knocked down some scales that had been placed on the platform, injuring Mrs. Palsgraf. Nothing in the appearance of the package indicated that it contained any explosive material.<sup>20</sup> Writing for the majority, Justice Cardozo held that while the defendant railroad was negligent, it was not liable to the particular plaintiff (Mrs. Palsgraf) who suffered the injury. Specifically, Justice Cardozo stated that "[t]he conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all."<sup>21</sup> Although the case conceptualized its analysis in terms of the scope of the duty owed,<sup>22</sup> it has subsequently been enshrined as the seminal case establishing that person-within-the-risk is a critical component of

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<sup>18</sup>See generally KEETON ET AL., *supra* note 1, at 280-90; DOBBS, *supra* note 12, at 453-58, 463-70.

<sup>19</sup>*Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>20</sup>*Id.* at 99.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* at 99-101. See KEETON ET AL., *supra* note 1, at 284-85 ("In 1928 something of a bombshell burst upon this field, when the New York Court of Appeals, forsaking 'proximate cause,' stated the issue of foreseeability in terms of duty."); DOBBS, *supra* note 12, at 456 n.12.

proximate cause.<sup>23</sup> The concept of person-within-the-risk has been applied continuously since the publication of this 1928 opinion.<sup>24</sup>

### C. Type-Within-the-Risk

The seminal cases regarding type-within-the-risk are *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound)*<sup>25</sup> and *Hughes v. Lord Advocate*.<sup>26</sup>

In *Wagon Mound*, a ship negligently discharged oil into Sydney Harbor. The oil had a very high flash point and, as such, presented a foreseeable risk of fouling the plaintiff's timber wharf and interfering with shipping, but no foreseeable risk of fire. Nonetheless, a fire, and damage to the wharf therefrom, resulted when molten metal from a nearby welding operation ignited cotton debris floating beneath the oil, which in turn achieved the necessary flash point and ignited the oil. Ultimately, the court found that the plaintiffs were not liable for the damages caused by the fire. The court reasoned that the foreseeable harm from the negligent discharge of oil was the harm that could be described as fouled docks, etc., and that liability should not extend to the unforeseeable harm caused by the fire.<sup>27</sup>

<sup>23</sup>See DOBBS, *supra* note 12, at 455-56:

*The Palsgraf illustration: class of persons at risk.* The most famous American case on proximate cause (or almost anything) is grounded in the same basic idea that liability should be limited to risks created by the defendant's negligent conduct. . . .

Since the unreasonable risk created by the defendant was a risk to the passenger, or at most to a very small circle of persons who might have been close enough to be injured if he fell, it created no recognizable risk at all to Mrs. Palsgraf. As Judge Cardozo said, "Relatively to her it was not negligence at all," so the defendant was not liable. Although Cardozo did not express this result as a rule of proximate cause, the outcome it dictates is the outcome of a proximate cause rule based on risk or foreseeability rule. "[T]he orbit of the danger as disclosed to the eye of reasonable vigilance" marked the scope of liability.

See also 4 HARPER ET AL., *supra* note 2, at 138-39.

<sup>24</sup>DOBBS, *supra* note 12, at 457; 4 HARPER ET AL., *supra* note 2, at 138 ("The view currently prevailing in this country, however, does limit the scope of the duty to do or refrain from doing a given act to (1) those persons that are likely to be endangered by the act or omission, and (2) harm (to such person or interest) from a risk the likelihood of which made the act or omission negligent.") (citing RESTATEMENT (SECOND) OF TORTS § 281(b), cmts c, e, f (1965); *Id.* §§ 442A, 442B; *Id.* at Appendix (to § 281) 305-309 (Reporter's Notes), (to §§ 442A, 442B) 201-204 (Reporter's Notes) (1966)); *Id.* at note 11; Buckner, *supra* note 9, at §§ 4, 5A; KEETON ET AL., *supra* note 1, at 284-89.

<sup>25</sup>*Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound)*, [1961] A.C. 388 (P.C. 1960) (appeal taken from Sup. CT. NSW).

<sup>26</sup>*Hughes v. Lord Advocate*, [1963] A.C. 837 (H.L.).

<sup>27</sup>*Wagon Mound*, [1961] A.C. 388; DOBBS, *supra* note 12, at 454-57. As expounded upon by Dobbs:

Under English authority existing up until that time, it would have been possible to reason that the defendant should be liable for the fire because there were no new independent causes of it; the defendant was a direct cause and that would have been enough for liability. But the Privy Council adopted the risk rule instead. It held that liability for negligence was to be coextensive with the negligence. If the defendant negligently created a risk of harm B. The Privy Council thought that since the only harm foreseeable from negligent discharge of the oil was harm in the nature of fouled

In *Hughes*, workmen who broke for tea left an open manhole guarded only by paraffin lamps and covered only by a tent. Two boys came upon the site and began exploring it. Ultimately, one of the boys, while inside the manhole, was burned when he touched a metal ladder that had been heated by the flames of one of the paraffin lamps after it too had fallen inside the hole. In this case, the court found that the defendants were liable for the burns sustained by the boy, even though contact with the source of heat may have come about in an unforeseeable way.<sup>28</sup> The court reasoned that the harm that was foreseeable with respect to the negligence associated with the paraffin lamps was the same kind of harm—a burn—that resulted. As stated by Lord Guest: “I cannot see that these are two different types of accident. They are both burning accidents and in both cases the injuries would be burning injuries.”<sup>29</sup> Though not using the specific nomenclature of type-within-the-risk, these cases established that the type of injury suffered is another of the critical components of result-within-the-risk based proximate cause.<sup>30</sup>

#### D. Manner-Within-the-Risk

There are a number of critical cases that developed the notion of manner-within-the-risk; one of those most directly focused on the concept is *Doughty v. Turner Manufacturing Company*.<sup>31</sup> In *Doughty*, a worker knocked an asbestos lid into a vat containing 800 degrees centigrade liquid. The vat cover underwent a chemical change, and the change produced water and steam that caused an eruption of the molten liquid, splashing the plaintiff. The court declined to impose liability on the defendant, reasoning that the way the liquid reached the plaintiff—propelled by a chemical reaction as opposed to a simple splash caused by the impact of the lid hitting the liquid—was unforeseeable. As such, the case is clearly focused on manner-within-the-risk.<sup>32</sup>

The other seminal cases discussed in this section can also be integrated into the development of manner-within-the-risk. For example, Mrs. Palsgraf, along with not

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docks, the defendant should not be liable for the entirely unforeseeable harm caused by fire. One way to express the idea is to say that, as to the fire, the defendant created no unreasonable risk and hence as to the fire, the defendant was not negligent at all. American cases are overwhelmingly consistent with this rule, although their manner of expression is often slightly different.

*Id.* at 455.

<sup>28</sup>*Hughes*, [1963] A.C. 837; 4 HARPER ET AL., *supra* note 2, at 134-36, n.6.

<sup>29</sup>*Hughes*, [1963] A.C. 837.

<sup>30</sup>DOBBS, *supra* note 12, at 457:

*Classes of persons and classes of risks.* *Palsgraf* differs from *Wagon Mound* in detail but not in fundamental thrust. The fundamental thrust is that liability for negligence is limited to the risks negligently created by the defendant. The difference in detail is that the risk at issue in *Wagon Mound* could be described as a risk of a certain type or class of harm, while the risk at issue in *Palsgraf* could be described as a risk to a certain class of person. Many, many common law cases are consistent with the scope of risk rules both in the language of foreseeability and in their results.

See also, Buckner, *supra* note 9, at §§ 4-5.

<sup>31</sup>*Doughty v. Turner Mfg Co.*, [1964] 1 QB 518.

<sup>32</sup>*Id.*; 4 HARPER ET AL., *supra* note 2, at 135-37, n.6.



being a person within the risk, was not injured in a foreseeable manner when viewed from the perspective of the defendant railroad. (One could argue a different conclusion regarding the man who carried the package of fireworks.) Similarly, in *Wagon Mound*, the timber warf was damaged in a manner that was unforeseeable from the perspective of the defendant working with oil characterized by a high flash point.

The question of emphasis is also important. In *Hughes*, for example, the manner in which the boy was burned is arguably not foreseeable, but the court appeared to be more focused on type. By contrast, type is certainly present in *Doughty*, but that court was more focused on manner.

Regardless of these vagaries and vicissitudes, however, *Palsgraf*, *Wagon Mound*, *Hughes*, and certainly *Doughty* have enshrined manner-within-the-risk as a critical part of the result-within-the-risk proximate cause analysis.<sup>33</sup>

### E. The Special Case of Intervening Cause

Intervening cause cases arise when one defendant negligently creates a risk of harm, but a subsequent force—often a second, negligent defendant, i.e., an intervening actor—is the immediate cause of the harm.<sup>34</sup> Historically, intervening cause cases posed two significant issues in the proximate cause context.

The first issue was whether the sequence of events should not only be relevant to, but controlling of, the proximate cause analysis. For a time, pursuant to the “direct cause” view of proximate cause, this question was answered in the affirmative.<sup>35</sup> The quintessential illustration of the direct cause view is the case of *In re Polemis*.<sup>36</sup> In *Polemis*, benzene vapors accumulated in the hold of a ship. Subsequently, an employee of the defendant negligently caused a plank to drop into the hold, creating a spark which exploded the vapor and destroyed the ship. Despite the fact that the resulting explosion was in no way foreseeable from the perspective of the actor

<sup>33</sup>See, e.g., DOBBS, *supra* note 12, at 466-69. Regarding manner-within-the-risk generally, Dobbs states:

*Manner of injury rule.* The defendant is liable for harms he negligently caused so long as a reasonable person in his position should have recognized or foreseen the general kind of harm the plaintiff suffered. He is not ordinarily relieved of liability merely because the manner of injury or its details were unforeseeable.

*Id.* § 189 at 466.

Regarding *Hughes* specifically, Dobbs states:

*Examples.* If the defendant negligently leaves kerosene where it might be ignited and burn the plaintiff, the fact that ignition unforeseeably triggered an explosion rather than a burning is of no consequence. The general type of accident was foreseeable, and from a known source of harm; the explosion is a mere “variant of the foreseeable.”

*Id.* See also 4 HARPER ET AL., *supra* note 2, at 139; Buckner, *supra* note 9, at § 5.

<sup>34</sup>KEETON ET AL., *supra* note 1, at 301; DOBBS, *supra* note 12, at 460; 4 HARPER ET AL., *supra* note 2, at 147-54.

<sup>35</sup>KEETON ET AL., *supra* note 1, at 293-97; DOBBS, *supra* note 12, at 458; 4 HARPER ET AL., *supra* note 2, at 147.

<sup>36</sup>*In re Polemis and Furness, Withy & Co.* [1921] 3 K.B. 560.

dropping the plank, recovery was allowed against the defendant because the act directly led to the explosion.<sup>37</sup>

After being the subject of much debate and criticism,<sup>38</sup> *Polemis* was subsequently overruled—and the direct cause view largely repudiated—by *Wagon Mound*, which, as stated earlier, was one of several critical cases establishing the importance of foreseeability to the proximate cause analysis.<sup>39</sup> More specifically, *Wagon Mound* replaced sequence of events with foreseeability as the operative concept in the proximate cause analysis of cases involving intervening acts.

Elevating foreseeability over sequence raised a second issue—exactly how should foreseeability be applied in cases involving intervening acts. The resolution of this issue is particularly important in determining whether the initial actor is the proximate cause of the ultimate injury despite the presence of the intervening actor. In answering this question, the courts have relied upon the person, type, and, in particular, manner-within-the-risk concepts established by the seminal cases discussed earlier.<sup>40</sup> As evolved, the rule is that if the intervening act is itself a foreseeable aspect of the risk created by the original, negligent defendant, then the original defendant is not relieved of liability, i.e., is nonetheless the proximate cause of the ultimate injury.<sup>41</sup>

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<sup>37</sup>*Id.*

<sup>38</sup>*See, e.g.,* KEETON ET AL., *supra* note 1, at 294-95:

This approach is obviously an arbitrary one, and of course not a matter of causal connection at all, but only of convenience in limiting liability.

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Artificial as it is, “direct” causation has been seized in quite a few cases as affording some way of steering a course between the alternatives of limiting all liability to the risk on the one hand, and unlimited liability on the other. But apart from the fact that it offers a mechanical solution of a problem which is primarily and essentially one of policy, it is not always easy to say whether new forces have intervened – as where for example, a wind changes its direction – and in nearly all cases of “direct” causation it is necessary to ignore as unimportant a number of external factors which have intervened before the result. More important, however, is the objection that no really successful and satisfactory limitation is provided which will eliminate the consequences which most of us felt, more or less instinctively, to be going too far.

*See also* 4 HARPER ET AL., *supra* note 2, at 174-76.

<sup>39</sup>KEETON ET AL., *supra* note 1, at 295-96; DOBBS, *supra* note 12, at 458.

<sup>40</sup>*See* sources cited *supra* notes 19-33 and accompanying text.

<sup>41</sup>KEETON ET AL., *supra* note 1, at 306; DOBBS, *supra* note 12, at 460-61. As articulated by Dobbs:

*Foreseeable intervening causes.* A ruling that an intervening actor is a superseding cause embodies the dual conclusion that the intervening actor should be responsible and that the original actor, in spite of his causal negligence, should not. The intervening cause terminology makes the issue look as if it were only concerned about the sequence of events and unrelated to issues of responsibility, foreseeability, or scope of risk. But in contemporary law, when courts then ask what counts as a superseding cause, they return to some form of the foreseeability inquiry. The rule is that if the intervening cause itself is part of the risk negligently created by the defendant, or if it is reasonably foreseeable at the time of the defendant’s negligent conduct, then it is not a superseding cause at all. In that case, the defendant is not relieved of liability merely because some other person or force triggered the injury.

Here again, *Wagon Mound* serves as a quintessential example: the original act of negligence was spilling oil with a high flash point; the intervening act was creating a spark that ignited cotton debris. The original actor was not relieved of liability simply because another act intervened, but because the type and manner of the ultimate injury were unforeseeable.<sup>42</sup>

A final example of the aspect of foreseeability relevant to result-within-the-risk being applied in the intervening cause context—an example of particular importance to this article—is provided by the seminal New York case of *Derdiarian v. Felix Contracting Corporation*.<sup>43</sup> In *Derdiarian*, the original defendant—a contractor—negligently exposed the plaintiff—a worker—to risk by requiring him to work with boiling enamel, while facing on-coming traffic, without adequately guarding the construction site. Subsequently, a driver who suffered a seizure after failing to take his anti-seizure medication drove through the site and struck the plaintiff. In holding that the contractor was the proximate cause of the plaintiff's injury, the court focused on manner-within-the-risk and concluded that the risk that rendered the original act by the contractor negligent to begin with, i.e., injury by an out of control vehicle driving through the unprotected site, was ultimately the manner in which the injury was inflicted.<sup>44</sup>

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The wordy labels – superseding, intervening, efficient, independent – although almost always invoked, turn out to be surplusage. The ultimate inquiry is merely whether the intervening cause is foreseeable or whether the injury is within the scope of the risk negligently created by the defendant.

*Id.* at 462.

<sup>42</sup>*Wagon Mound*, [1961] A.C. 388; DOBBS, *supra* note 12, at 455.

The *Wagon Mound* case should not be misunderstood. If the risk of fire had been small but foreseeable and the defendant had had a useful purpose in discharging the oil, the balance of risks and utilities might indicate that the defendant was not negligent at all and hence not liable. On the other hand, if the defendant had no good reason for discharging the oil, even a small risk of fire might be enough to justify a finding that the defendant was negligent. In that case, the fact that fire was foreseeable would indicate that the defendant should be liable for fire damage, even though the risk was small.

*Id.*

<sup>43</sup>*Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 671 (N.Y. 1980).

<sup>44</sup>*Id.* at 671. The Court specifically rejected the argument that a driver losing control of his car while suffering a seizure after failing to take anti-seizure medication was an unforeseeable manner-within-the-risk as a matter of law:

By contrast, in the present case, we cannot say as a matter of law that defendant Dickens' negligence was a superseding cause which interrupted the link between Felix's negligence and plaintiff's injuries. From the evidence in the record, the jury could have found that Felix negligently failed to safeguard the excavation site. A prime hazard associated with such dereliction is the possibility that a driver will negligently enter the worksite and cause injury to a worker. That the driver was negligent, or even reckless, does not insulate Felix from liability. Nor is it decisive that the driver lost control of the vehicle through a negligent failure to take medication, rather than a driving mistake. The precise manner of the event need not be anticipated. The finder of fact could have concluded that the foreseeable, normal and natural result of the risk created by Felix was the injury of a worker by a car entering the improperly protected work area.

*Id.* See also DOBBS, *supra* note 12, at 462.

## III. THE SUBSTANTIAL FACTOR TEST

A. *Development and Application*

The substantial factor test was first proffered as a test for proximate cause by Jeremiah Smith in his seminal, early twentieth century article entitled “Legal Cause in Actions of Tort.”<sup>45</sup> Smith began his article by defining the problem of causation as follows: assuming wrongful conduct on the part of the defendant and legally compensable damage suffered by the plaintiff, should the court “regard the defendant’s conduct as the cause, in the legal sense, of the damage to the plaintiff, and . . . hold the defendant liable for such damage.”<sup>46</sup> He then proceeded “to consider the intrinsic correctness of the allege rule of non-liability for improbable consequences.”<sup>47</sup> This rule was the most significant proximate cause rule of the day—a nascent result-within-the-risk approach focused on the foreseeability, or probability, of the consequences of negligence.<sup>48</sup> Smith felt that such a rule relieved negligent defendants in a way that, ultimately, was arbitrary. He asked, rhetorically, “[s]hould the law absolve the defendant on the ground that the harmful consequence which actually followed was not reasonably foreseeable, i.e., one which could not reasonably have been anticipated . . . .”<sup>49</sup> and opined that it should not because, ultimately, such a requirement mandated that the initial and resulting harm be identical in nature.<sup>50</sup>

Finally, Smith focused his inquiry on the problem of what, then, should constitute “a relation of cause and effect (such a causal relation) between defendant’s Tort and plaintiff’s damage as is sufficient to maintain an action in Tort . . . .”<sup>51</sup> and concluded that the defendant’s tort must have been a “substantial factor” in producing the resulting harm.<sup>52</sup> Smith elaborated:

To constitute such causal relation between defendant’s tort and plaintiff’s damage as will suffice to maintain an action of tort, the defendant’s tort must have been a substantial factor in producing the damage complained of.<sup>53</sup>

And further:

“Substantial” is not here meant to be understood as expressing merely the idea of “actual,” as opposed to “normal.” It is meant to be understood as expressing the idea of “considerable” or “of some magnitude,” in

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<sup>45</sup>Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911).

<sup>46</sup>*Id.* at 103.

<sup>47</sup>*Id.* at 223.

<sup>48</sup>*Id.* at 223-52; see sources cited *supra* notes 11-18 and accompanying text.

<sup>49</sup>Smith, *supra* note 45, at 237-38.

<sup>50</sup>*Id.* at 238.

<sup>51</sup>*Id.* at 309.

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 310.

antithesis to “trifling,” “slight,” “trivial” or “minute.” This notion of “considerable” is the idea sometimes (though it may not be always) conveyed by the word “substantial” in the statement, that, in order to maintain an action for certain kinds of “nuisance,” the damage must be “substantial.”<sup>54</sup>

It should be noted that Smith did not appear to be advocating abandoning foreseeability in the negligence analysis as a whole. Rather, he felt that foreseeability determined the extent of the duty owed, and that initial duty and resulting harm were substantially related if they were “of a like general character”<sup>55</sup> or “related to the same persons or class of persons, and to the same subject matter,”<sup>56</sup> or if the harm was brought about it the same general “mode” or manner.<sup>57</sup>

Smith’s view was of academic interest only, until it was adopted by the Restatement of Torts.<sup>58</sup> The Restatement appeared to make the substantial factor test critical to all aspects of cause—actual (cause in fact) and proximate. Specifically, Section 431 stated that an actor’s negligent conduct was a legal cause of harm if “his conduct is a substantial factor in bringing about the harm.”<sup>59</sup> Section 433 listed

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 238.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>RESTATEMENT OF TORTS §§ 431, 433 (1934). As described, with mild indignation, by Prosser:

The late Jeremiah Smith once proposed as a test of proximate cause, that “the defendant’s tort must have been a substantial factor in producing the damage complained of.” This was picked up by the supreme court of Minnesota in a case of merging fires presenting an issue of causation in fact, and was used by the court as a substitute for the obviously inapplicable “but for” rule of causation. This case in turn was taken over by the Restatement of Torts, which in its original form, adopted “substantial factor” as a test not only of causation, but also of the “proximate.” A number of courts have followed this, apparently accepting the phrase as the answer to all prayers and some sort of universal solvent.

KEETON ET AL., *supra* note 1, at 278 (footnotes omitted). See also 4 HARPER ET AL., *supra* note 2, at 180 (“This ‘test’ for limiting liability attracted no following in the courts, and only scant attention from commentators, until the Restatement of Torts adopted it.”).

<sup>59</sup>RESTATEMENT OF TORTS § 431 (1934). The section read as follows:  
§ 431. Legal Cause; What Constitutes

The actor’s negligent conduct is a legal cause of harm to another if

- (a) his conduct is a substantial factor in bringing about the harm, and
- (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Comment *a* to Section 431 elaborated, in relevant part, as follows:

*a. Distinction between substantial cause and cause in the philosophic sense.* In order to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent . . . [T]his is necessary but it is not of itself sufficient. The negligence must also be a substantial factor as well as an actual factor in bringing about the plaintiff’s harm. The word “substantial” is used to denote the

considerations important in determining whether negligent conduct was a substantial factor in producing harm, including “lapse of time”<sup>60</sup> and “whether after the event and looking back from the harm to the actor’s negligent conduct it appeared highly extraordinary that it should have brought about the harm.”<sup>61</sup> Subsequently, in the 1948 revisions to the Restatement, the second factor quoted from Section 433 was transferred to Section 435, entitled “Foreseeability of Harm or Manner of its Occurrence.”<sup>62</sup> As amended, Sections 431, 433, and 435 were carried over to the Second Restatement of Torts.<sup>63</sup>

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fact that the defendant’s conduct had such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility . . . .

<sup>60</sup>RESTATEMENT OF TORTS § 433(d) (1934). Section 433 read as follows:

§433. Considerations Important in Determining Whether Negligent Conduct is a Substantial Factor in Producing Harm.

The following considerations are in themselves or in combination with one another important in determining whether the actor’s conduct is a substantial factor in bringing about harm to another:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
- (b) whether after the event and looking back from the harm to the actor’s negligent conduct it appears highly extraordinary that it should have brought about the harm;
- (c) whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
- (d) lapse of time.

<sup>61</sup>*Id.* § 433(b).

<sup>62</sup>RESTATEMENT OF TORTS (Supplement) §§ 433, 435 (1948). It was thought, or hoped, by some that this change would limit the application of the substantial factor test to cause in fact. *See, e.g.,* KEETON ET AL., *supra* note 1, at 278 (“The 1948 revision of the Restatement limited its [i.e., the substantial factor test] application very definitely to cause in fact alone.”); 4 HARPER ET AL., *supra* note 2, at 181-82, n. 45 (“Perhaps it was always the intent of the Institute that ‘substantial factor’ be a test only of cause in fact . . . .”); Buckner, *supra* note 9 at § 7. Despite the changes worked by the 1948 revisions, however, the substantial factor test has continued to play a significant role in the proximate cause analysis. *See* sources cited *infra* notes 81-83 and accompanying text.

<sup>63</sup>RESTATEMENT (SECOND) OF TORTS §§ 431, 433, 435 (1965). Currently, these sections read as follows:

§ 431. What Constitutes Legal Cause

The actor’s negligent conduct is a legal cause of harm to another if

- (a) his conduct is a substantial factor in bringing about the harm, and
- (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

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§ 433. Considerations Important in Determining Whether Negligent Conduct is a Substantial Factor in Producing Harm.

Perhaps because of the way the test came into being and assumed prominence, there are no seminal cases establishing it, as there are with foreseeability based proximate cause. There are, however, any number of instructive examples providing insight into and illustrating application of the test.

An early illustration comes from Smith himself. In his article, he asks: “[i]f I negligently frighten my neighbor’s horse and he suddenly whirls around thereby upsetting the carriage and throwing my neighbor out, can I escape liability because the chances were that the horse, instead of whirling about, would have dashed the carriage against the wall?”<sup>64</sup> Analyzed within the context of his article, Smith believed that the frightening of the horse was a substantial factor in bringing about, and the proximate cause of, the result because the neighbor against whom the negligence was directed is the individual who was injured, and the initial negligence and ultimate result were related in terms of “manner” or “mode”, i.e., both were related to the reaction of a negligently frightened horse.<sup>65</sup> Most importantly, Smith felt that the fact that the specific reaction of the horse was not foreseeable should not defeat a finding of proximate cause.<sup>66</sup>

A second, early illustration is based on *Hill v. Winsor*,<sup>67</sup> as adapted by the first Restatement. Pursuant to the Restatement adaptation, the illustration presumes that a captain of a vessel “seeing men at work on a dock, may realize the necessity of docking gently so as not to cause harm to any of the workman, but . . . would not expect a workman out of his sight to be upon a plank kept in position by the pressure of two pilings.”<sup>68</sup> It concludes that if “the negligent bumping of the ship against the dock should cause the pilings to spring apart, thus releasing the board and causing

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The following considerations are in themselves or in combination with one another important in determining whether the actor’s conduct is a substantial factor in bringing about harm to another:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
- (b) whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
- (c) lapse of time.

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#### § 435. Foreseeability of Harm or Manner of Its Occurrence

- (1) If the actor’s conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.
- (2) The actor’s conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor’s negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.

<sup>64</sup>Smith, *supra* note 45, at 239.

<sup>65</sup>*Id.* at 223-52.

<sup>66</sup>*Id.* at 238-39. See *Mahoney v. Beatman*, 147 A. 762, 765 (Conn. 1929).

<sup>67</sup>*Hill v. Winsor*, 118 Mass. 251(1875).

<sup>68</sup>RESTATEMENT OF TORTS § 433, comment *e* (1934).

the workman to fall between the pilings, which as they sprang together crushed him,” the negligence would be a substantial factor in bringing about, and thus a proximate cause of, the result.<sup>69</sup> Again staying within the context of Smith’s article, the analysis appears to be that the original duty and resulting damage were sufficiently related in “manner” or “mode.”<sup>70</sup> In addition, the original negligence and resulting harm were related in terms of “class of plaintiff”<sup>71</sup> and “nature” of harm.”<sup>72</sup>

One contemporary illustration of the substantial factor approach is *Medcalf v. Washington Heights Condominium Association*.<sup>73</sup> In *Medcalf*, the defendant negligently maintained an electric buzzer system of an apartment building, with the result that a tenant could not buzz-in the plaintiff, who had come to visit. While waiting in the lobby, the plaintiff was attacked by a third party.<sup>74</sup> The court felt that the defendant’s negligence was not a substantial factor in bringing about, i.e., was not the proximate cause of, the result. The court first reiterated the view that “[t]he substantial factor test reflects the inquiry fundamental to all proximate cause questions, that is, whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant’s negligence.”<sup>75</sup> Then, focusing on the class of plaintiff and the manner or mode of inflicting the injury, the court concluded as a matter of law that the defendants “could not have reasonably foreseen that a malfunctioning intercom system might provide a substantial incentive or inducement for the commission of a violent criminal assault on their property by one stranger upon another.”<sup>76</sup>

A final contemporary illustration is *Derdiarian*.<sup>77</sup> As discussed earlier, *Derdiarian* involved a plaintiff construction worker who was injured after being struck by a driver, who failed to take anti-seizure medication and suffered a seizure while driving. The defendant contractor, who negligently failed to protect the work-site and exposed the plaintiff to on-coming traffic in the first place, argued that its negligence was not the proximate cause because it could not foresee that a driver would lose control of his car through a negligent failure to take medication.<sup>78</sup> The court held that the actions of the contractor were a substantial factor in bringing about, and a proximate cause of, the result. The court premised its discussion on the view that, while a defendant’s negligence must be a “substantial cause” of the events

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<sup>69</sup>*Id.*

<sup>70</sup>Smith, *supra* note 45, at 313, illus. 6.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>*Medcalf v. Wash. Heights Condo. Ass’n*, 747 A.2d 532 (Conn. App. Ct. 2000).

<sup>74</sup>*Id.* at 534.

<sup>75</sup>*Id.* at 535.

<sup>76</sup>*Id.* at 536.

<sup>77</sup>*Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666 (N.Y. 1980).

<sup>78</sup>*Id.* at 670. (“Defendant [contractor] now argues that plaintiff was injured in a freakish accident, brought about solely by defendant [driver’s] negligence, and therefore there was no causal link, as a matter of law, between [contractor’s] breach of duty and plaintiff’s injuries.”).



which produce an injury, the precise “manner” in which an accident happens need not be foreseeable. Rather, the court concluded, the fact that the injury was occasioned by a car entering the improperly protected work area was sufficient to establish “legal” cause.<sup>79</sup> It should also be noted that while the Court focused its substantial factor analysis on mode or manner, class of plaintiff (a worker) and type of harm (being burned or crushed) are also present.<sup>80</sup>

These illustrations provide some insight into the workings of the substantial factor test, but they do not begin to convey the scope of its acceptance. On this point, history provides a more accurate gauge.

### *B. Impact and Criticism of the Substantial Factor Test*

Specifically, the fact that the Restatement adopted the substantial factor test was an extremely significant development.<sup>81</sup> Since that event, the test has been a part of the proximate cause analysis in a plethora of cases in many jurisdictions.<sup>82</sup>

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<sup>79</sup>*Id.* at 671.

<sup>80</sup>*Id.*

<sup>81</sup>See sources cited *infra* notes 82-83 and accompanying text. See also 4 HARPER ET AL., *supra* note 2, at 180, 184, n.55; NY PJ1 2:70 (2008).

<sup>82</sup>See, e.g., *City of Fairbanks v. Nesbett*, 432 P.2d 607 (Alaska 1967); *State v. Abbott*, 498 P.2d 712 (Alaska 1972); *Herzberg v. White*, 66 P.2d 253 (Ariz. 1937); *Bigbee v. Superior Court*, 155 Cal. Rptr. 545 (Cal. Ct. App. 1979); *United States v. Southern California Edison Co.*, 413 F. Supp. 2d 1101 (E.D. Cal. 2006) (applying California law); *Kinderavich v. Palmer*, 15 A.2d 83 (Conn. 1941); *Busko v. DeFilippo*, 294 A.2d 510 (Conn. 1972); *Winn v. Posades*, 881 A.2d 524 (Conn. App. Ct. 2005); *Gurguis v. Frankel*, 888 A.2d 1083 (Conn. App. Ct. 2006); *Heller v. D.W. Fish Realty Co.*, 890 A.2d 113 (Conn. App. Ct. 2006); *Mitchell v. Branch*, 363 P.2d 969 (Haw. 1961); *Panion v. United States*, 385 F. Supp. 2d 1071 (D. Haw. 2005) (applying Hawaii law); *Huey v. Milligan*, 175 N.E.2d 698 (Ind. 1961); *Eischeid v. Dover Const., Inc.*, 217 F.R.D. 448 (N.D. Iowa 2003) (applying Iowa law); *Chapman v. Labone*, 460 F. Supp. 2d 989 (S.D. Iowa 2006) (applying Iowa law); *Bailey v. N. Am. Refractories Co.*, 95 S.W.3d 868 (Ky. Ct. App. 2001); *Wetmore v. MacDonald, Page, Schatz, Fletcher & Co.*, 476 F.3d 1 (1st Cir. 2007) (applying Maine Law); *Glinski v. Szylling*, 99 N.W.2d 637 (Mich. 1959); *Johnson v. Evanski*, 22 N.W.2d 213 (Minn. 1946); *Lietz v. N. States Power Co.*, 718 N.W.2d 865 (Minn. 2006); *Stuedemann v. Nose*, 713 N.W.2d 79 (Minn. Ct. App. 2006); *New Orleans & N.E.R. Co. v. Burge*, 2 So. 2d 825 (Miss. 1941); *Rein v. Benchmark Const. Co.*, 865 So. 2d 1134 (Miss. 2004); *Giles v. Moundridge Milling Co.*, 173 S.W.2d 745 (Mo. 1943); *Hildreth v. Key*, 341 S.W.2d 601 (Mo. Ct. App. 1960); *Phillips v. Stockman*, 351 S.W.2d 464 (Mo. Ct. App. 1961); *Maxfield v. Maxfield*, 151 A.2d 226 (N.H. 1959); *In re Haines*, 808 A.2d 72 (N.H. 2002); *Estate of Joshua T. v. State*, 840 A.2d 768 (N.H. 2003); *Carignan v. New Hampshire Intern. Speedway, Inc.*, 858 A.2d 536 (N.H. 2004); *Rappaport v. Nichols*, 156 A.2d 1 (N.J. 1959); *Kulas v. Public Serv. Elec. & Gas Co.*, 196 A.2d 769 (N.J. 1964); *Mitchell v. Friedman*, 78 A.2d 417 (N.J. 1951); *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666 (N.Y. 1980); *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451 (N.Y. 1980); NY PJ1 2:70; *Brennen v. City of Eugene*, 591 P.2d 719 (Or. 1979); *Simon v. Hudson Coal Co.*, 38 A.2d 259 (Pa. 1944); *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978); *Feeney v. Disston Manor Personal Care Home, Inc.*, 849 A.2d 590 (Pa. 2004); *Roche v. Ugly Duckling Car Sales, Inc.*, 879 A.2d 785 (Pa. 2005); *Lux v. Gerald E. Ort Trucking, Inc.*, 887 A.2d 1281 (Pa. Super. Ct. 2005); *Jeffords v. Lesesne*, 541 S.E.2d 847 (S.C. Ct. App. 2000); *Carney v. Goodman*, 270 S.W.2d 572 (Tenn. Ct. App. 1954); *Naifeh v. Valley Forge Life Ins. Co.*, 204 S.W.3d 758 (Tenn. 2006); *Willis v. Settle*, 162 S.W.3d 169 (Tenn. Ct. App. 2004); *Weaver v. McClintock-Trunksey Co.*, 111 P.2d 570 (Wash. 1941); *State v. Meekins*, 105 P.3d

Currently, it is clearly playing a major role in the proximate cause arena, second only to the foreseeability based test of result-within-the-risk.<sup>83</sup>

This is all the more remarkable given the pointed, and often scathing, criticism the test has suffered for its entire history—from its inception to the present. One early critic was Leon Green. In a seminal article, Green issued a scathing critique of not only the substantial factor test, but the use of the test as related to “legal cause,” and the entire approach to legal cause as embodied in the Restatement of Torts.<sup>84</sup> Regarding legal cause generally, Green wrote, rather poetically:

If they had been inspired by all the imps that can bring confusion into the administration of law, they could not have succeeded in their attempt in that respect more overwhelmingly. “Proximate cause” in all its philosophic splendor could never have visioned the verbalistic magnificence of that synthetic pretender, “legal cause.” And if any considerable number of courts are gullible enough to attempt to write this hedge-podge into the law, it will take a century to get rid of it.<sup>85</sup>

He also called Section 433, which articulated considerations relevant to the substantial factor test, “one of those amazing sections attempting to elaborate the meaning of ‘substantial factor,’ a phrase already reduced to its lowest terms, and valuable only as the ‘reasonable man’ is valuable for jury formula purposes.”<sup>86</sup>

A second permanent critic was Prosser. In his treatise, Prosser states:

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420 (Wash. Ct. App. 2005); *Hatch v. Smail*, 23 N.W.2d 460 (Wis. 1946); *Schultz v. Brogan*, 29 N.W.2d 719 (Wis. 1947); *Pfeifer v. Standard Gateway Theater*, 55 N.W.2d 29 (Wis. 1952); *Wintersberger v. Pioneer Iron & Metal Co.*, 94 N.W.2d 136 (Wis. 1959); *Sampson v. Laskin*, 224 N.W.2d 594 (Wis. 1975); *Phelps v. Woodward Const. Co.*, 204 P.2d 179 (Wyo. 1949). For additional, more extensive compilations, see Appendix, *RESTATEMENT (SECOND) OF TORTS* §§ 431, 433, 435 (Supp. 2007), and *Buckner*, *supra* note 9, at § 7 (1965 and Supp.).

<sup>83</sup>*Buckner*, *supra* note 9, at §§ 4-7; 4 *HARPER ET AL.*, *supra* note 2, 183-84 (“The most generally used expressions appear to be those involving some form of the directness test; those associated with foreseeability . . . ; and the [substantial factor] test.”).

<sup>84</sup>Leon Green, *The Torts Restatement*, 29 *ILL. L. REV.* 582 (1934). Beyond criticizing the articulation of any particular principle, Green seemed to oppose the very idea of drafting a restatement:

The attempt to restate tort law in rigid black letter form was a serious mistake which must be charged against the Institute itself rather than the Reporter and his associates. Tort law is too liquid, too much a matter of processes, too growing and luxuriant to submit to any such tight form of statement, and doubtless this accounts for much of the grotesqueness which is found in the Restatement. Of course, the Reporter and his associates might have satisfied themselves with a Restatement of the processes, but that would have required the inclusion of a large percentage of procedures as opposed to substantive law. In their efforts to carry out the commission which they were given they have tried to separate the two and state only the substantive law of torts, with the inevitable result that the product is a sort of dehydrated something, drained of nearly all of the vitality found in such abundance in this, one of the most dynamic fields of government.

*Id.* at 584-85.

<sup>85</sup>*Id.* at 607.

<sup>86</sup>*Id.* at 603.

[W]hen the “substantial factor” is made to include all of the ill-defined considerations of policy which go to limit liability once causation in fact is found, it has no more definite meaning than “proximate cause,” and it becomes a hindrance rather than a help. It is particularly unfortunate in so far as it suggests that the questions involved are only questions of causation, obscuring all other issues, and as it tends to leave to the jury matters which should be decided by the court.<sup>87</sup>

A third prominent critique is Harper. Harper states that:

“Substantial factor” as a test of *proximate* cause is no more helpful than proximate cause itself. If defendant’s wrong is a substantial cause in fact of plaintiff’s harm, recovery should not be denied because of any further consideration of cause. To be sure recovery may be prevented by other kinds of considerations such as limitations on the scope of duty. But the term *substantial factor* is no more appropriate to describe these considerations than is any of the other cause formulas . . .<sup>88</sup>

A final prominent critic is Dobbs. Through his critique of the substantial factor test is not the most scathing, it is, perhaps, the most dismissive. In his treatise, in a section entitled, “Formal tests: substantial factor, continuing sequence and intervening cause,” Dobbs states:

The term proximate cause by itself explains nothing, not even the kind of evidence to be considered. In an effort to define the term, courts have at various times invoked a litany of equally impenetrable phrases, some of them simply opaque, others actively misleading. Some of those that are not in common use can be left to a footnote.<sup>89</sup>

In a supporting footnote, Dobbs concludes:

At one time, some authorities said that to be a proximate cause, the defendant’s conduct must be a substantial factor in causing the plaintiff’s harm. That term explains nothing about what to look for and runs the risk of confusing cause in fact issues to which it is sometimes applied in lieu of the but-for test.<sup>90</sup>

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<sup>87</sup>KEETON ET AL., *supra* note 1, at 278 (citing Green, *supra* note 84, at 602); William Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19 (1936). Though first articulated as early as the 1930s, these criticisms of the substantial factor test have been carried forward in near verbatim fashion. *See, e.g.*, NY PJI 2:70:

As Dean Prosser suggests with respect to substantial factor as applied to the fact of causation alone it is of considerable assistance, but with respect to policy considerations, such as foreseeability or intervening cause, which go to limit liability once causation is found, it can have the effect of obscuring the issue and leaving to the jury matters that should be decided by the court.

<sup>88</sup>4 HARPER ET AL., *supra* note 2, at 182 (citing Green, *supra* note 84; C. MORRIS & C. R. MORRIS, *MORRIS ON TORTS* 174 (2d ed. 1980)).

<sup>89</sup>DOBBS, *supra* note 12, at 452.

<sup>90</sup>*Id.* at 452, n.2.

Yet, despite the stature of the critics and the well-informed and well-reasoned nature of the criticism, the substantial factor test as a measure of proximate cause has not only endured, but, in many jurisdictions, prevailed.<sup>91</sup>

#### IV. RECONCILING THE SUBSTANTIAL FACTOR AND RESULT-WITHIN-THE-RISK APPROACHES TO PROXIMATE CAUSE

The perpetuation of a dispute over something so fundamental as the approach to the proximate cause component of the negligence cause of action would certainly have a negative impact on the tort system as a whole. Given the prominence of the negligence action and the critical function of the proximate cause component to that action, the ongoing nature of the dispute would leave jurisdictions uncertain with respect to, and at odds with one another over, appropriate limits on liability, and beyond this, notions of fundamental fairness in terms of compensation for significant injuries. It is, perhaps, such concerns that prompted the nature of the criticism that proponents of the dueling approaches have leveled against one another.<sup>92</sup>

These negative concerns, however, do not appear to have materialized. Rather, while the approaches are irreconcilable from a theoretical perspective, as applied by the courts the proximate cause analysis grounded in substantial factor appears to be yielding the same results with respect to liability as the proximate cause analysis grounded in foreseeability.<sup>93</sup> Beyond this, a significant amount of common ground has emerged in the means that have yielded these consistent ends.<sup>94</sup>

Two significant reasons lie behind this phenomenon. The first is that, at their origins, the two approaches may have had more in common than was initially

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<sup>91</sup>See sources cited *supra* notes 81-83 and accompanying text.

<sup>92</sup>In this regard, the observations of the Court in *Mahoney v. Beatman*, 147 A. 762 (Conn. 1929), are as relevant today as they were nearly a century ago:

Few subjects in the law in the past 30 years have been written upon more extensively by the greatest thinkers in the field of torts than that of "*Proximate Cause*." These writers differ widely in their reasoning and conclusions, but are in agreement in the conclusion that judicial *reasoning and discussion of this subject has left our law in a most uncertain and unsound condition*. They have, we think, made their demonstration so complete that it is all the more regrettable that they so widely differ in their theories and methods of reasoning. It is due to their lack of reasonable agreement, and to the treatment of the subject by most of the writers in a way altogether too difficult of understanding and too abstract for presentation to a jury, that the courts have as a rule failed to give the consideration to the written discussion of these eminent authorities in the field of torts which their wealth of material so richly deserved.

*Id.* at 764-65 (emphasis added).

<sup>93</sup>Compare cases categorized in section 5 (a-c) of Buckner, *supra* note 9, with cases in section 7. See 4 HARPER ET AL., *supra* note 2, at 182:

As to the language in vogue in different states, virtually every one of the tests [for proximate cause] has had some currency among the courts of the different states, both in charges to the jury and in judicial opinions. And many states may be said to "adopt" one "rule" at one time, and another "rule" at another time. The fact is that in a great number of situations it makes very little difference what test is used.

*Id.*

<sup>94</sup>See sources cited *infra* notes 95-139 and accompanying text.

realized. Throughout the course of its development, and particularly since the advent of *Palsgraf* and *Wagon Mound*, much had been written about the aspects of result—person, type and manner—relevant to the result-within-the-risk approach.<sup>95</sup> What has passed largely without comment, however, is that these same components of result have always been relevant to the substantial factor approach.

It is true that Smith did not discuss aspects of result in the section (the third) of his seminal article articulating the substantial factor test itself.<sup>96</sup> He did, however, reaffirm the relevance of person, type and manner to the proximate cause analysis in the section (the second) of his article dealing with his criticism of foreseeability based rules of non-liability for improbable consequences.<sup>97</sup> Specifically, in discussing the relationship between initial negligent conduct and ultimate result, he stated, “[u]ndoubtedly they both must relate to the same persons or class of persons, and to the same subject matter.”<sup>98</sup> He also stated that the negligent actor should not be able to “escape liability on the ground that he could not foresee the precise manner in which the harm would occur, nor the exact nature of the harm . . . .”<sup>99</sup>

These statements can be interpreted in various ways. Smith was certainly arguing against approaching proximate cause from a perspective of specific foreseeability.<sup>100</sup>

At the same time, he recognizes the relevance of foreseeability and may be suggesting that foreseeability be considered an aspect of substantiality for purposes of substantial factor, or that foreseeable manner, interpreted broadly, serve as some sort of outside limit on substantial factor. In any event, as is the case with result-within-the-risk, the aspects of result relevant to the substantial factor approach to proximate cause appear to be person, type, and manner.

The second reason for the finding of common ground between the result-within-the-risk and substantial factor approaches to proximate cause is that they have followed opposite, but ultimately complementary, tracks in their development; over the course of their development, the substantial factor approach has narrowed and the result-within-the-risk approach has broadened. In a very real sense, the two approaches have moved toward one another.

Historically, the main problem with the substantial factor approach was that it was extremely broad—even without criteria—to the point that any negligent act that was a but for cause of a particular harm would automatically be deemed to be its proximate cause.<sup>101</sup> Perhaps nothing illustrates this point better than the fact that the Restatement of Torts, in adopting the substantial factor approach to proximate

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<sup>95</sup>See, e.g., DOBBS, *supra* note 12, at 454-58, 463-70.

<sup>96</sup>Smith, *supra* note 45, at 303-27.

<sup>97</sup>*Id.* at 223-52.

<sup>98</sup>*Id.* at 238.

<sup>99</sup>*Id.*

<sup>100</sup>*Id.*

<sup>101</sup>See sources cited *supra* notes 84-91 and accompanying text.

cause,<sup>102</sup> originally illustrated the application of the approach by referring to the situation presented in *Polemis*.<sup>103</sup>

Specifically, in the comment on Clause (b) of Section 433 in the 1934 Restatement, the reporter writes:

So, a stevedore loading a vessel may have no reason to expect that the fall of a plank into the hold will do more than damage the vessel or cargo immediately below; but the court, which knows from the accident itself that there were explosive fumes in the hold, may find nothing highly extraordinary in the fact that the fall of the plank caused metal to come in contact with metal causing a spark which ignited these fumes and started a fire which consumed the whole vessel.<sup>104</sup>

In retrospect, given the policies underlying the doctrine, a finding of proximate cause pursuant to the facts of *Polemis* appears difficult to justify and undermines any approach that leads to such a finding.<sup>105</sup>

By 1965, however, *Polemis* had been dropped as an illustration of substantial factor,<sup>106</sup> suggesting that the facts of the case would illustrate “extraordinary” manner,<sup>107</sup> and otherwise indicating a narrowing of what constitutes substantial factor. Beyond this, the facts of *Polemis* never seemed to support a finding of substantial factor to begin with: the class of plaintiffs threatened by the negligence act (those working below deck) differed from the plaintiff actually injured (the owners of the ship); the nature of the damage (injury to a workman from being struck as opposed to injury to a ship consumed by fire) also differed.<sup>108</sup>

A contemporary illustration of the narrowing of substantial factor is found in *Medcalf*.<sup>109</sup> As noted earlier, *Medcalf* involved a plaintiff who was attacked in a lobby of a building and then sued the owner for negligent maintenance of a non-working buzzer.<sup>110</sup>

Viewed most broadly, one of the functions of a buzzer and intercom system is to prevent injury caused by criminal activity, the plaintiff was injured by criminal

<sup>102</sup>See sources cited *supra* notes 58-63 and accompanying text.

<sup>103</sup>RESTATEMENT OF TORTS § 433 cmt. e (1934).

<sup>104</sup>*Id.*

<sup>105</sup> See sources cited *supra* notes 35-39 and accompanying text; KEETON ET AL., *supra* note 1, at 295 n.24 (citing Arthur Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449 (1930); Arthur Goodhart, *The Imaginary Necktie and the Rule of Re Polemis*, 68 L.Q. REV. 514 (1952); Arthur Goodhart, *The Brief Life Story of the Direct Consequence Rule in English Tort Law*, 53 VA. L. REV. 857 (1967); Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 48 YALE L.J. 390, 39 COLUM. L. REV. 20 (1939); Douglas Payne, *The “Direct” Consequences of a Negligent Act*, 5 CURR. LEG. PROB. 189 (1952).

<sup>106</sup>RESTATEMENT (SECOND) OF TORTS § 435 cmt. d (1965).

<sup>107</sup>RESTATEMENT (SECOND) OF TORTS § 435 (1965).

<sup>108</sup>See *supra* notes 38-39 and accompanying text.

<sup>109</sup>*Medcalf v. Wash. Heights Condo. Ass’n, Inc.*, 747 A.2d 532 (Conn. App. Ct. 2000).

<sup>110</sup>See sources cited *supra* notes 73-76 and accompanying text.

activity, and therefore the negligent maintenance of the buzzer was a substantial factor in both the but for and proximate cause sense. Viewed more narrowly, however, and defining substantiality with reference to class of persons and limiting it with reference to foreseeable manner, the negligent maintenance of the buzzer does not play a substantial role in the proximate cause of the injury. The buzzer and intercom system is designed to protect occupants of the building, not visiting “strangers”; the manner of injury the system seeks to avoid is a stranger gaining access to the building and attacking an occupant, not a stranger attacking another stranger before either has gained entrance.

Interpreted narrowly, this substantial factor analysis of *Medcalf* is completely consistent with a result-within-the-risk analysis, *to wit*, the foreseeable person-within-the-risk of a defective intercom system is a building occupant, not a visiting stranger; the foreseeable, general manner of injury is attack by an intruder, not a stranger lurking outside.

Regarding result-within-the-risk, historically, the fear with foreseeability based proximate cause is that it operates too narrowly and relieves defendants that should be held liable.<sup>111</sup> This concern was noted by Smith when he wondered why a defendant who spooked a horse should escape liability because the frightened animal reacted one way (whirling about) as opposed to another (bolting).<sup>112</sup> This concern was also born out in the earlier, seminal result-within-the-risk cases previously noted. Specifically, *Palsgraf* relieved the defendant railroad of liability even though its conduct foreseeably endangered patrons and Ms. Palsgraf was a nearby patron.<sup>113</sup> *Wagon Mound* relieved the defendant ship owners of liability even though their negligently spilled oil destroyed the dock that was otherwise threatened.<sup>114</sup>

For the past several decades, however, the notion of what is foreseeable appears to have broadened. Ironically, this process may have begun with *Wagon Mound* itself. Regarding the case, Dobbs cautions that if the defendant had had no justification for discharging the oil, “even a small risk of fire might be enough to justify a finding that the defendant was negligent. In that case, the fact that fire was foreseeable would indicate that the defendant should be liable for fire damage, even though the risk was small.”<sup>115</sup> This was precisely the situation in *Wagon Mound II*,<sup>116</sup> which, six years after *Wagon Mound*, involved damage to ships docked at the same wharf.<sup>117</sup> As described by Prosser, “[t]his time there was evidence justifying the conclusion that the defendants were, or should have been, aware that there was

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<sup>111</sup>See, e.g., Smith, *supra* note 45, at 223-52; See sources cited *supra* notes 47-50 and accompanying text.

<sup>112</sup>Smith, *supra* note 45, at 239; See sources cited *supra* note 64 and accompanying text.

<sup>113</sup>See sources cited *supra* notes 19-24 and accompanying text.

<sup>114</sup>See sources cited *supra* notes 25-27, 42 and accompanying text.

<sup>115</sup>DOBBS, *supra* note 12, at 455.

<sup>116</sup>*Overseas Tankship (U.K.). Ltd. v. Miller S.S. Co. (Wagon Mound II)*, [1967] 1 A.C. 617 (P.C. 1967) (appeal taken from Sup. CT. NSW).

<sup>117</sup>*Id.*

some slight risk that the oil on the water would be ignited, although it was very unlikely."<sup>118</sup> Unlikely or not, the defendants were found liable.<sup>119</sup>

Prosser felt that *Wagon Mound II* wrongly minimized the significance of foreseeability in the proximate cause context, stating that "[t]he effect comes close to letting the *Polemis* case in again by the back door, since cases will obviously be quite infrequent in which there is not some recognizable slight risk of this character."<sup>120</sup> By contrast, Dobbs felt that *Wagon Mound II* was not a retreat from *Wagon Mound*, but rather "nothing more than a perfectly logical application of the rules of proximate cause."<sup>121</sup> Regardless of the perspective taken, however, it seems clear that *Wagon Mound II* broadens the notion of foreseeability in the proximate cause context.

This has occurred in a plethora of other contexts as well; two notable ones are person-within-the-risk in the context of bystanders injured by defective products and manner-within-the-risk in the context of intervening criminal acts. Regarding the former, for much of its history, liability for defective products did not extend to bystanders, i.e., courts considering the issue reasoned that manufactures owed no duty to bystanders, or that bystanders were not persons-within-the-risk for proximate cause purposes.<sup>122</sup> The Restatement of Torts (Second) itself left the issue open.<sup>123</sup> Beginning in the 1970's, however, this began to change. Currently, the overwhelming majority of courts<sup>124</sup> (and legislatures)<sup>125</sup> extend recovery for defective

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<sup>118</sup>KEETON ET AL., *supra* note 1, at 296.

<sup>119</sup>*Wagon Mound II*, 1 A.C. 617.

<sup>120</sup>KEETON ET AL., *supra* note 1, at 296.

<sup>121</sup>DOBBS, *supra* note 12, at 455 n.9.

<sup>122</sup>*See, e.g.,* *Winnett v. Winnett*, 310 N.E.2d 1 (Ill. 1974); RESTATEMENT (SECOND) OF TORTS § 402A, cmt. o (1965).

<sup>123</sup>RESTATEMENT (SECOND) OF TORTS § 402A (stating as a caveat that "[t]he Institute expresses no opinion as to whether the rules . . . may not apply . . . to harm to persons other than users or consumers").

<sup>124</sup>*See, e.g.,* *Elmore v. Am. Motors Co.*, 451 P.2d 84, 89 (Cal. 1969) (providing protection to bystanders from reasonably foreseeable product defects); *West v. Caterpillar Tractor Co.*, 366 So. 2d 80, 92 (Fla. 1976) (applying strict liability to bystanders within the range of harm); *Embs v. Pepsi-Cola Bottling Co.*, 528 S.W.2d 703, 705 (Ky. 1975) (finding no substantial reason for not protecting bystanders from defective products); *Osborne v. Int'l Harvester Co.*, 688 P.2d 390, 397 (Or. Ct. App. 1984) (extending the doctrine of strict liability to bystanders injured by unreasonably dangerous products), *review dismissed*, 691 P.2d 483 (Or. 1984). *See also* *Wasik v. Borg*, 423 F.2d 44, 47 (2d Cir. 1970); *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776, 780-81 (N.D. Ind. 1969); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979); *Sullivan v. Green Mfg. Co.*, 575 P.2d 811, 816 (Ariz. Ct. App. 1977); *Cottom v. McGuire Funeral Serv.*, 262 A.2d 807, 809 (D.C. 1970); *Rindlisbaker v. Wilson*, 519 P.2d 421, 428 (Idaho 1974); *Mieher v. Brown*, 278 N.E.2d 869, 874 (Ill. 1972) *rev'd on other grounds*, 301 N.E.2d 307 (Ill. 1973); *Walker v. Clark Equip. Co.*, 320 N.W.2d 561, 562 (Iowa 1982); *Weber v. Fidelity & Cas. Ins. Co.*, 250 So. 2d 754, 755 (La. 1971); *Piercefield v. Remington Arms Co.*, 133 N.W.2d 129, 135 (Mich. 1965); *Coco-Cola Bottling Co. v. Reeves*, 486 So. 2d 374, 378 (Miss. 1986); *Giberson v. Ford Motor Co.*, 504 S.W.2d 8, 11 (Mo. 1974); *Tirrell v. Navistar Int'l, Inc.*, 591 A.2d 643, 649-50 (N.J. Super. Ct. App. Div.), *cert. denied*, 599 A.2d 166 (N.J. 1991); *Codling v. Paglia*, 298 N.E.2d 622, 628 (N.Y. 1973); *Jones*



products to bystanders, thus, at least in effect, considering bystanders foreseeable for the purpose of the person-within-the-risk proximate cause analysis.

Regarding the latter, historically, courts held intervening criminal acts unforeseeable as a matter of law, which, in effect, rendered them unforeseeable for purposes of manner-within-the-risk proximate cause and relieved the original negligent actor of liability.<sup>126</sup> A seminal case here is *Watson v. Kentucky*,<sup>127</sup> which relieved a defendant who negligently spilled a tank car of gasoline of liability for an explosion because an intervening criminal actor threw a match into the gasoline.<sup>128</sup> By the end of the twentieth century, however, courts were abandoning this doctrine and expanding manner-within-the-risk to include criminal acts that were foreseeable from the perspective of the original, negligent defendant.<sup>129</sup>

In any event, regardless of which particular component of result is focused upon, the notion of what is foreseeable for result-within-the-risk purposes has broadened. Indeed, there would seem to be little doubt that the criticism implicit in Smith's earlier referenced hypothetical regarding a frightened horse is no longer justified;<sup>130</sup> as presently applied, a defendant who negligently frightened his neighbor's horse would be the result-within-the-risk base proximate cause of the plaintiff's injuries regardless of whether the horse whirled, bolted, or reacted in any way whatsoever.

Two ultimate examples of the reconciliation between the substantial factor and result-within-the-risk approaches to proximate cause come from two cases noted earlier—*Hill v. Winsor*<sup>131</sup> and *Derdiarian v. Felix Contracting*.<sup>132</sup> Indeed, coming as

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v. White Motor Corp., 401 N.E.2d 223, 226 230 (Ohio Ct. App. 1978); *Moss v. Polycy, Inc.* 522 P.2d 622, 626 (Okla. 1974); *Webb v. Zern*, 220 A.2d 853, 854 (Pa. 1966); *Russell v. Bishop*, No. 88, 1986 WL 653, \*2, 3 (Tenn. Ct. App. Jan. 7, 1986); *Darryl v. Ford Motor Co.*, 440 S.W. 630, 633 (Tex. 1969); *Howes v. Hansen* 201 N.W.2d 825, 828 (Wis. 1972).

<sup>125</sup>See, e.g., CONN. GEN. STAT. ANN. § 52-572m (West 1991) (defining claimant for products liability purposes); IDAHO CODE ANN. § [6-1402] 6-1302 (4) (1990) (defining claimant as any person or entity that suffers harm); ILL. REV. STAT. ch. 735, ¶ 5/13-213 (a) (3) (1993); IND. CODE ANN. § 33-1-1.5-2 (LexisNexis 1995); KAN. STAT. ANN. § 60-3302 (c,d) (Supp. 1993); KY. REV. STAT. ANN. §§ 411.300-320 (LexisNexis 1992); LA. REV. STAT. ANN. § 9:2800.53 (4) (West 1991) (defining claimant as any person or entity that asserts a claim); MO. ANN. STAT. § 537.760 (West 1988); N.J. STAT. ANN. § 2A:58C-1(b) (1) (West 1987); N.M. STAT. ANN. § 13-1406 (LexisNexis 1995) (providing a jury instruction that places liability on the supplier for injuries to both reasonably foreseeable consumers of the product and persons in the general vicinity when the product is used); OHIO REV. CODE ANN. § 2307.71(A) (West 1995); OR. REV. STAT. § 30.920(3) (1993) (declaring that liability for unreasonably dangerous product must be constructed according to § 402A); TENN. CODE ANN. § 29-28-102(6) (1980); TEX. CIV. PRAC. & REM. CODE ANN. § 82.001 (Vernon 1995); WASH. REV. CODE ANN. § 7.72.010(5) (West 1992).

<sup>126</sup>See, e.g., DOBBS, *supra* note 12, at 470-74 ("In an earlier era, courts tended to hold that intervening criminal acts were unforeseeable as a matter of law.").

<sup>127</sup>*Watson v. Ky. and Ind. Bridge and R.R. Co.*, 126 S.W. 146 (Ky. 1910).

<sup>128</sup>*Id.*

<sup>129</sup>DOBBS, *supra* note 12, at 472 (citing *Britton v. Wooten*, 817 S.W.2d 443, 449 (Ky. 1991) ("This archaic doctrine has been rejected everywhere.")).

<sup>130</sup>Smith, *supra* note 45, at 239.

<sup>131</sup>*Hill v. Winsor*, 118 Mass. 251 (1875).

they do from opposite ends of the historical timeline, the opinions, and the commentary they have inspired, can be said to frame the journey of reconciliation.

*Hill* involved a defendant who negligently docked a tug boat and injured a workman by crushing him between the piles of a bridge, as opposed to simply knocking him down.<sup>133</sup> As discussed earlier, the first Restatement used this case to illustrate what considerations were important in determining when negligent conduct constituted proximate cause as defined by substantial factor.<sup>134</sup> Much later, Prosser discusses *Hill* as a seminal case establishing “general type,” as opposed to “precise nature,” as the focus of the manner-within-the-risk component of proximate cause.<sup>135</sup>

*Drediarian* involved a defendant who negligently failed to protect a construction site, with the result that a workman was injured by a driver who drove through the site after failing to take anti-seizure medication and suffering a seizure.<sup>136</sup> As noted earlier, the case is a seminal, contemporary example of foreseeable intervening cause in the context of manner-within-the-risk proximate cause.<sup>137</sup> Even Dobbs, who is utterly dismissive of the substantial factor approach, discusses the case at some length, and with seeming approval, in analyzing foreseeable intervening causes.<sup>138</sup> Yet, *Drediarian* is clearly following a contemporary version of the substantial factor approach to proximate cause.<sup>139</sup> Nonetheless, as applied, the substantial factor approach is completely consistent with, and yields the same results as, the foreseeability based result-within-the-risk approach to proximate cause.

## V. CONCLUSION

From one perspective—the perspective of their theoretical origins—the result-within-the-risk view of proximate cause, with its focus on foreseeability, and the substantial factor view, with its focus on significance, are irreconcilable. This apparent irreconcilability has caused consternation and confusion.

<sup>132</sup>*Drediarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 671 (N.Y. 1980).

<sup>133</sup>*Winsor*, 118 Mass. at 251.

<sup>134</sup>See sources cited *supra* notes 67-69 and accompanying text.

<sup>135</sup>KEETON ET AL., *supra* note 1, at 299. Prosser was concerned that *Hill* and other cases were extreme in their expansive interpretation of foreseeability, stating:

Some “margin of leeway” has to be left for the unusual and the unexpected. But this has opened a very wide door; and the courts have taken so much advantage of the leeway that it can scarcely be doubted that a great deal of what the ordinary person would regard as freakish, bizarre, and unpredictable has crept within the bounds of liability by the simple device of permitting the jury to foresee at least its very broad, and vague, general outlines. This becomes, in the courtroom, a matter for the skill of the advocate who can lay stress upon broad, general and very simple things, and stay away from all complications of detail.

*Id.* (citations omitted).

<sup>136</sup>*Drediarian*, 414 N.E.2d 666.

<sup>137</sup>See sources cited *supra* notes 43-44 and accompanying text.

<sup>138</sup>DOBBS, *supra* note 12, at 462. See sources cited *supra* notes 89-90 and accompanying text.

<sup>139</sup>See sources cited *supra* notes 77-80 and accompanying text.

From another perspective, however—the perspective of present application—the two approaches may be viewed as two means to a harmonious and important end.

Whether approached from the means of substantial factor, with its focus on significance as qualified by foreseeable manner, or the means of result-within-the-risk, with its focus on narrow concepts of foreseeable person, type and manner within-the-risk and the broadening of these concepts over time, the end appears to be the finding of common ground for purposes of the proximate cause analysis.

If an accord has been achieved in practice, if the views have been reconciled in application, it would be no small achievement. It would mean, finally, that there is agreement on what aspects of result constitute the critical focus of the proximate cause inquiry.<sup>140</sup>

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<sup>140</sup>As noted nearly eighty years ago in *Mahoney v. Beatman*, 147 A. 762, 764 (Conn. 1929):

The desirability from a practical standpoint of a workable rule for determining the legal consequences resulting from a negligent act, at once understandable and sufficiently accurate in its applicability to enable a trial court to so present it to a jury that they may grasp it, has been growingly important as the changes in economic conditions have multiplied so vastly the instances of the problems in what the courts have denominated “proximate causation.”