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# Proximate Cause in Illinois

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Is the question of proximate cause a question of law in Illinois, or a question of fact, or is it a mixed question of law and fact? There are cases that seem to support each of these propositions. Proximate cause is ordinarily a question of fact for the jury, but where the facts are undisputed, and the inferences to be drawn from them are plain, and not open to doubt by reasonable men, it is the duty of the court to determine the question as a matter of law.

The Supreme Court of Illinois in *Meyer* v. *Butterbrodt,* 146 Ill. 131, held that, "unless there has been some prejudicial error in the court's instructions upon the question of proximate cause, when an issue is formed, and a trial had by a jury, and there is any evidence tending to show that the wrong complained of was the proximate cause of the injury, the finding of the jury on the question of proximate cause, when approved by the trial and Appellate Courts, is as conclusive against the appellant on that as on any other fact in the case."

In spite of this positive statement of the law, the Supreme Court has repeatedly reversed the finding of the jury, when approved by the trial and Appellate Courts, on the ground that there was a lack of proximate cause. It might be added here, that the courts of last resort in all of the other states have, at different times, taken the same shifting, and inconsistent, positions with regard to this same question. The question naturally arises, why should there be this general confusion and inconsistency, when it is so easy to state the rules governing proximate cause?

The answer is to be found in the fact that, when the courts are talking about proximate cause, they are thinking about something quite different, and translating it into the language of proximate cause. Strange as it may seem, in most of the cases that are reversed for lack of proximate cause, the causal relation was either, not involved at all, not in issue, or not decisive of the real issue in the case. In order to make the truth of this apparent, it will first be necessary to analyze the different problems that are found in every tort action, and then apply the resulting tests to the cases that are supposed to turn upon the question of proximate cause.

The following analysis of a tort action has been so ably worked out and so clearly presented by Leon Green on pages 2 and 3 of his valuable work entitled "Rationale of Proximate Cause," that it will be given here substantially verbatim.

(1) Is the plaintiff's interest protected by law, i. e., does the plaintiff have a (legal) right?

(2) Is the plaintiff's interest protected against the particular hazard (loss or injury) encountered?

  (a) What rule (principle) of law protects the plaintiff's interest?

  (b) Does the hazard encountered fall within the limits of the protection afforded by the rule?

(3) Did the defendant's conduct violate the rule which protects the plaintiff's interest?

(4) Did the defendant's violation of such rule cause the plaintiff's damages? [This is our proximate cause problem.]

(5) What are the plaintiff's damages?

Questions (1) and (2) are questions of law to be answered by the court in performing its judicial function before anything else is considered in the case, because the answers to them are decisive, in most cases, of the only question in issue in the case. Questions (3), (4) and

(5) are questions of fact to be answered by the jury under appropriate instructions of the court, in performing its legal function of determining the facts in the case. The court often fails to perform its judicial function, either because it fails to recognize the first two problems as peculiarly its own, or because it prefers to let the jury try to solve them. Now if the jury, composed of laymen ignorant of the law, makes a mistake in solving these problems that are so difficult for a trained and experienced lawyer, what does the reviewing court do when the case is brought before it? It generally solves the problem by assuming it to be one of causal relation, and as a result, we have another confusing case on proximate cause.

Judge Cooley, in his treatise on the Law of Torts at page 30 § 15, lays down this first proposition in dealing with proximate cause: "In the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result."

In *Brownback* v. *Frailey,* 78 Ill. App. 262, the plaintiff sought to recover, in an action of trespass, for the fright and consequent miscarriage caused by the defendant's threatening her with a whip. The reviewing court held that the defendant as a trespasser, was liable for all the proximate consequences of the assault, even though he was ignorant of her pregnant condition, and could not have anticipated such a result from his assault. In this class of cases, i. e., torts of absolute liability, as distinguished from those of conditional liability, the same or similar states of facts have occurred so frequently and have been passed upon so often by the courts that the problems as to whether the plaintiff has a legal right, and whether the hazard encountered falls within the limits of the protection to be given the plaintiff's interest, are problems no longer, and in their place has grown up a body of very definite rules of law governing such

cases. As Judge Cooley says, "Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence."

The second proposition is this: "When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause." Cooley on Torts, p 30 § 15.

In *Braun* v. *Craven,* 175 Ill. 401, the plaintiff sought to recover for the fright and resulting nervous disorder caused by the defendant's abusive conduct and language towards her, and in her presence. A judgment for the plaintiff was reversed because it was held to be against public policy to allow a recovery in such cases, where the only damage suffered by the plaintiff consisted of fright and nervous shock, and where there had been no physical impact. It was also held that the defendant was guilty of no negligence, because such a result was not to be anticipated by the defendant from his conduct, and that if the plaintiff were allowed to recover in such cases, then any person who might happen to be passing by in the street could also recover, if he suffered fright and nervous shock as a result of hearing or seeing the defendant's violent conduct. This hazard does not fall within the scope of the protection to be given the plaintiff's interest, and if the trial court had solved its own problem, the case would have been disposed of without going to the jury.

In *Phillips* v. *Dickerson,* 85 Ill. 11, the plaintiff sought to recover for fright and consequence miscarriage resulting from the defendant making an assault upon her husband, within her hearing, but not in her presence. The

defendant did not know that she was in the next room, and that she could hear him, nor did he know that she was pregnant at that time. The trial court sustained a demurrer to the plaintiff's evidence, and gave judgment for the defendant. The Supreme Court, in a divided opinion, affirmed the judgment on the ground that the defendant's conduct was not the proximate cause of the plaintiff's injuries, inasmuch as the defendant could not have anticipated any such results from his conduct. If we apply the test for causal relation laid down by Professor Green in his Rationale of Proximate Cause at page 139, "Was the defendant's conduct an appreciable factor in causing plaintiff's damages?" we find that the causal relation is very evident and really not in issue at all. The decisive problem is once again the scope of the protection to be given the plaintiff's interest, and when that is solved, the question of causal relation disappears, "This," says the same author, on page 78, "is the most common error found in the decisions involving proximate cause; that of mistaking a question of the scope of the protection to be given an interest for a problem of causal relation."

Injuries due to fright in the absence of physical impact are not within the scope of the protection afforded by the rule of law invoked. This is really based upon public policy, a balancing the interests involved with the conclusion that it is better to deny protection under such circumstances than to undertake to give compensation under all the difficulties of the case. See Green Rationale of Proximate Cause, page 36.

This case also illustrates another very common error in holding that, because the defendant could not foresee or anticipate such a result from his conduct, therefore it was not a proximate result of his conduct. The test for negligence, viz., "Could the defendant foresee the probability of harm resulting from his conduct?" is in Professor Green's words, a qualitative test for a qualita-

tive problem, while the test for causal relation, as already given, is a quantitative test for a quantitative problem. The two problems are so essentially different that it can only produce more confusion to try to solve one problem by applying the test for the other.

In *City of Rockford* v. *Tripp,* 83 Ill. 247, the plaintiff sought to recover for personal injuries received by him as a result of having been run over by a team of horses that became frightened and broke a hitching post, provided by the defendant city, and ran away. The Supreme Court, in reversing a judgment for the plaintiff, held that there was no evidence of negligence on the part of the defendant city in providing said hitching post, and that the damages were too remote, and not a proximate consequence of the defect in the post. This is a case where, the evidence raising no issue of negligence, and thus demanding a directed verdict on this point, the problem is treated as one of causal relation for the court. The question of causal relation is not in issue, because if the defendant's conduct did not violate the rule of law invoked to protect the plaintiff's interest, then the causal relation is immaterial.

The next cases to be considered are those that are covered by Judge Cooley's next proposition, p. 30 § 15: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent."

In *American Express Co.* v. *Risley,* 179 Ill. 295, the plaintiff, a brakeman, sought to recover for personal injuries received by him when he was struck by a chute that the servants of the defendant left lying crosswise in the express car contrary to their usual custom. The motion of the train caused the protruding end of the chute to

strike against a car standing on a side track, which, in turn, caused the other end of the chute to swing around and strike the plaintiff. A judgment for the plaintiff was affirmed by the Supreme Court, which held that the negligence of the defendant's servants in leaving the chute in that dangerous position was the proximate cause of the injury to the plaintiff. Here again the scope of the protection to be given an interest is mistaken for a problem of causal relation. There is no question of causal relation in issue.

Professor Green, in his "Rationale of Proximate Cause," page 27, analyzes a recent Illinois case as follows: "In *Maskaliunas* v. *C. & W. I. R. R. Co.,* 318 Ill. 142, the plaintiff, a young boy [nearly eight years of age], sought to recover for injuries received while trying to board a moving [freight] train operated by the defendant in the city of Chicago. Negligence was predicated on the defendant's failure to have its right of way fenced as required by a city ordinance. The court having held that the ordinance was for the protection of infants against such hazards (their own irresponsible trespasses) and the jury having found causal connection between the failure to maintain a fence and plaintiff's injuries, judgment in the plaintiff's favor was affirmed. Again, the decisive question was the scope of protection afforded by the rule violated by the defendant." He further states, "The same process is inevitable in suits based upon the rules of the common law. The fact that the rule is statutory or of common law origin can make no difference." In *Heiting* v. *C. R. I. & P. Ry. Co.,* 252 Ill. 466, which was based on very similar facts and the same city ordinance, the court and jury reached the same conclusions as in the preceding case and the same comment would apply.

In *Pullman Palace Car Co.* v. *Bluhm,* 109 Ill. 20, the plaintiff sought to recover for injuries received while working for the defendant, from the breaking of a defec-

tive derrick provided by the defendant. This resulted in certain lumber falling upon the plaintiff and breaking his arm between the elbow and the shoulder. Due to some mistake in the treatment of this fracture, the ends of the bone failed to unite, thus forming a "false joint." The Supreme Court, in affirming a judgment for the plaintiff, held that, if the plaintiff had used ordinary care in the selection of the doctors and nurses to treat his injury, then the negligence of the defendant was the proximate cause not only of the original injury, but also of the additional aggravation of that injury caused by the mistake of the doctors and nurses in treating the injury. This is normally not a problem of causal relation, but one of the scope of the protection afforded by the rule that the defendant has violated. This is a problem for the court, and it must consider all the factors in the case, and not merely the cause factor alone. The fact that mistakes in curing an injury are naturally incident to an injury, has a tendency to influence the court to extend the protection to cover the most usual of these hazards. Green's Rationale of Proximate Cause, pp. 105-106.

The next group of cases to be analyzed are those that illustrate Judge Cooley's next proposition, p. 31 § 15: "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote."

In *Schmidt* v. *Mitchell,* 84 Ill. 195, the plaintiff sought to recover, under the Dram Shop Act, for the death of the plaintiff's husband, as a result of the defendant selling liquor to her husband, whereby he became intoxicated, and while intoxicated, was shot in the thigh, in attempting to break in the windows of a house at night. The trial court refused to admit evidence that he had used the injured leg contrary to the doctor's orders. After several days, the leg was amputated and he died

three hours later. It was also contended that the amputation of the injured leg was unnecessary. The Supreme Court, in reversing a judgment for the plaintiff, in a divided opinion, with two judges dissenting, held that the death was due to his own misconduct in using the injured leg contrary to the doctor's orders and not to the intoxication. This was not a question of causal connection but it was a problem for the court—that of defining the limits of the protection afforded by the statute. This applies as well to the mistake of the doctor in amputating, as it does to the injured party's own misconduct in disobeying the doctor's orders.

In *Schulte* v. *Schleeper,* 210 Ill. 357, the plaintiff sought to recover under the Dram Shop Act the compensation provided for by said act, to be paid the plaintiff for taking care of B, while he was recovering from the effects of injuries received while B was intoxicated, as a result of the defendant selling liquor to B. The defendant sold liquor to P and B, who became intoxicated, and while in that condition, P assaulted B with a buggy spoke and hub causing serious injury to B. The Supreme Court, in affirming a judgment for the defendant, held that the assault by P on B was the proximate cause of B's injuries and not the intoxication of B. It also held that the trial court was justified in sustaining the demurrer to the declaration for lack of proximate cause as a matter of law. This was not a cause problem, either, but a question of law, for the court, whether such an injury is within the scope of the protection afforded by the statute.

In *Milostan* v. *City of Chicago,* 148 Ill. App. 540, the city had permitted an opening or areaway of considerable dimensions to remain unguarded in a sidewalk which ran along beside a building. A companion of the plaintiff, who was walking with him along the sidewalk, grabbed the plaintiff from the rear and pushed him into the opening, resulting in serious injuries to the plaintiff.

The Appellate Court, in reversing a judgment for the plaintiff, held with one judge dissenting, that the defendant's negligence was not the proximate cause of the plaintiff's injuries because the wilful act of the plaintiff's companion intervened and broke the causal connection. In his Rationale of Proximate Cause, on page 101, Professor Green, discussing this case, says, "It is possible perhaps to make a cause issue under the fact by considering the part played by the city's negligence with that of the companion who shoved plaintiff into the hole. It is possible to say the city's fault played no appreciable part in the result. But it is much clearer, equally decisive, and perhaps more rational to consider that the hazard here involved did not fall within the protection of the rule violated by the city. If, on the other hand, the plaintiff had been passing in the dark and had stumbled into the hole, such would have been a hazard within the rule. When the rule has been bounded, the cause issue disappears in cases of this character."

The next group of cases to be considered are those from which Judge Cooley draws the following conclusion: "If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury." Cooley on Torts, p. 31 § 15.

In *Village of Carterville* v. *Cook,* 129 Ill. 152, the village had permitted a sidewalk, which was six feet above the surface of the ground, to remain unguarded by a railing. When another boy pushed his companion into the plaintiff, a boy fifteen years of age, the plaintiff was knocked off the sidewalk at this unguarded place and seriously injured. The Supreme Court, in affirming a judgment for the plaintiff, held that the negligence of the village and the concurrent negligence of the boy who pushed the other boy into the plaintiff constituted the proximate cause of the injury. The hazard was one

that the plaintiff was protected against, because it was a negligent act, as distinguished from an intentional act, as in the preceding case. "The big point," as Professor Green on page 158 of his Rationale of Proximate Cause says, in discussing these two situations, "is that in the case of the plaintiff's being intentionally forced into the hole, the court would probably hold the harm received was not a hazard protected against by the rule invoked, while in the other case it was. The duty to protect the plaintiff against hurt from the excavation does not comprehend risks arising from X's [third party] intentional acts, while it does his negligent acts."

In *True & True Co.* v. *Woda,* 201 Ill. 315, the defendant piled lumber on a sidewalk, in violation of a city ordinance. The plaintiff's intestate, a four year old child, was playing around the lumber pile with other children when some heavy timbers fell off the pile and killed the child. It did not appear, whether the timbers fell as a result of being imperfectly piled, or as a result of the other children throwing them off the pile. The Supreme Court, in affirming a judgment for the plaintiff, held that the defendant's negligence was the proximate cause of the death of the child, and that the defendant should know that a pile of lumber on a sidewalk was likely to attract small children and that some of the lumber would fall on them and injure them. The negligent conduct of the other children was a risk against which the child's interest was protected by the rule invoked.

In *Weick* v. *Lander,* 75 Ill. 93, the defendant had piled building material on both sides of a street, leaving only a narrow passageway for the traffic. The plaintiff's son, twelve years of age, was riding in a wagon, which was suddenly stopped by a collision with another wagon, at the place where the defendant had obstructed the street. The driver of another wagon, which was following, did not notice the wagon in front stop, and the pole

of the rear wagon struck the boy and killed him. The Supreme Court, in affirming a judgment for the plaintiff, held that the defendant's unlawful conduct in obstructing the street amounted to a nuisance, and was the proximate cause of the boy's death. The negligent conduct of the other driver was a risk against which the boy's interest was protected by the rule invoked.

In *West Chicago Street Ry. Co.* v. *Feldstein,* 169 Ill. 139, the plaintiff sought to recover for injuries received as a result of the collision of two street cars operated by different companies. The rear end of one car swung around and struck the plaintiff, as he was waiting for the car to pass, and thus caused his injury. He sued both companies, and then dismissed as to one company and took judgment against the other. The Supreme Court affirmed the judgment, saying that the negligence of the defendant was the proximate cause of the injury, even though it was unusual, as both companies were joint tort-feasors. The negligent act of the other company was a risk against which the plaintiff's interest was protected by the rule invoked.

In *Stecher* v. *People,* 217 Ill. 348, the plaintiffs sought to recover, under the Dram Shop Act, for the death of their father, which deprived them of their means of support. The defendant sold liquor to B, who became intoxicated, and while in that condition, shot and killed the father of the plaintiffs. In affirming a judgment for the plaintiffs, the Court held that the intoxication of B was the proximate cause of the death of the father, as B would not have shot the father had B been sober. This was a risk against which the plaintiff's interest was protected by the statute.

In *Meyer* v. *Butterbrodt,* 146 Ill. 131, the plaintiff sought to recover, under the Dram Shop Act, for the death of her husband. The defendant sold liquor to her husband, who became intoxicated, and while in that condition, he went in swimming and was drowned, although,

ordinarily, a good swimmer. In affirming a judgment for the plaintiff, the court held that the husband's intoxication was the proximate cause of his death. This was a risk against which the plaintiff's interest was protected by the statute invoked. The cases on proximate cause which have arisen under this statute are in hopeless confusion. On almost similar states of fact, the decision in the Schulte case is directly opposed to that in the Stecher case, and the decision in the Schmidt case is directly opposed to that in the Meyer case. The causal connection is evident in all four cases, but the Supreme Court persisted in making the decisive factor that of proximate cause, instead of that of defining the limits of the protection to be given the plaintiff's interest by the Dram Shop Act.

The next cases deal with the question, of how far one may be chargeable with the spread of fire negligently started by himself. In *Fent* v. *T. P. & W. Ry. Co.*, 59 Ill. 349, sparks from a locomotive operated by the defendant set fire to A's house from where it spread to the plaintiff's house and destroyed it. The court sustained a demurrer to the evidence, and gave judgment for the defendant. The Supreme Court held it was reversible error to hold, as a matter of law, that the damages were too remote, as that was a question for the jury, and that the loss was a natural consequence and was foreseeable. According to Professor Green causal relation is seldom involved in these fire cases. Usually the decisive question is negligence. Most courts submit these cases to the jury on the issue of negligence. Was the loss by fire in this particular way a probable consequence, and could the defendant foresee such a result? To hold that such a result is not the proximate result of defendant's conduct is erroneous. Cause is not the weakness of the plaintiff's case. There are only two problems in such cases; one for the court, as to the scope of the protec-

tion, and the other for the jury, as to the defendant's negligence or ability to foresee such a result.

In *T. W. & W. Ry. Co.* v. *Muthersbaugh,* 71 Ill. 572, a warehouse near the right of way was set on fire by sparks from a locomotive operated by the defendant. A strong wind carried fire brands from the burning warehouse to the plaintiff's stables, a distance of one hundred rods, and set fire to, and destroyed the stables. A judgment for the plaintiff was reversed by the upper court on the ground that the loss was not a proximate result of the defendant's conduct. Cases which deny liability for lack of proximate cause on facts similar to those in this case are, in the words of Professor Green, legal atrocities. In *C. P. & St. L. Ry.* v. *Willard,* 111 Ill. App. 225, sparks from a locomotive operated by the defendant set fire to the plaintiff's peat land and growing crops. While the plaintiff was busy saving his crops, his cattle, standing on the burning peat, were badly burnt about the legs and injured. A judgment for the plaintiff was affirmed by the upper court on the ground that such a result was foreseeable, and was a proximate result of the defendant's negligence. Is such a hazard within the limits of the protection afforded? Was such a result foreseeable by the defendant? These are the only problems involved, and they are mistaken by the court for a problem of causal relation.

Judge Cooley, page 37 § 16, says, "Where an injury is due to a defect in a street or highway in conjunction with the fright of a horse, the defect is generally held to be the proximate cause." In *City of Joliet* v. *Shufeldt,* 144 Ill. 403, a horse while being driven along a street, runs away without fault on the part of the driver or the plaintiff, whereby the plaintiff is thrown from the vehicle at a place where the street was left by the city in an unsafe condition and injured. A judgment for the plaintiff was affirmed on the ground that the defect was the proximate cause, and that public policy favored lia-

bility in such cases, in order to minimize the number of accidents and injuries on the crowded streets due to a failure to keep the streets in repair. What the court is doing here is defining the limits of the protection to be given by the rule invoked but again it is mistaken for a cause problem.

In *City of Rock Falls* v. *Wells,* 169 Ill. 224, the plaintiff, in order to avoid a collision with a run-away horse, drove her sleigh to the other side of the street but was held by a street-car track that was raised several inches above the surface of the street. The run-away horse caused the wheel of the buggy he was attached to, to slide along the track and strike the plaintiff and injure her. A judgment for the plaintiff was affirmed by the upper court, which held that the defect was the proximate cause of the injury as it was foreseeable that it would cause some injury. Again this is not a cause problem, but a matter of defining the limits of the protection. In *City of Bellville* v. *Hoffman,* 74 Ill. App. 503, the plaintiff was injured when his horse ran away and his wagon upset when it struck a street-car track that was elevated several inches above the surface of the street and left in that condition by the city. A judgment for the plaintiff was affirmed on the ground that the defect was the proximate cause. When the scope of the protection is fixed and the negligence of the city is found, the cause problem disappears in this class of cases.

The next group of cases are those that are authorities for the following proposition as given by Judge Cooley on page 38 § 16: "Where the act or omission complained of merely creates a condition, it is not the proximate cause of an injury produced by other causes which take effect in the particular way by reason of the condition." In *Wabash R. R.* v. *Coker,* 81 Ill. App. 660, the plaintiff, with a horse and wagon, and another person, with a horse and buggy, were detained by the defendant blocking a railroad crossing for more than ten minutes,

contrary to the statute. When the locomotive coupled to the cars, the horse of the other person became frightened and caused the buggy to strike against the wagon, and thus throw the plaintiff to the ground and injure him. The reviewing court, in reversing a judgment for the plaintiff, held that the violation of the statute was not the proximate cause, as the accident might have happened as well within the legal period of blocking the crossing as when it did. "The problem is not one of causal relation. The conduct of the defendant contributed appreciably to the result. The fact that the same result might have ensued irrespective of the defendant's violation of the statute does not mean that the violation of the statute did not contribute thereto. Neither does the fact that the other agency contributing to the result is either a natural force, or an innocent or wrongful act of another person, in any wise affect causal relation." The foregoing comments are from Professor Green's Rationale of Proximate Cause. The big point is to define the scope of the protection given to the plaintiff's interest by the statute.

In *C. C. C. & St. L. Ry.* v. *Lindsay,* 109 Ill. App. 533, the defendant violated the statute by blocking a crossing for more than ten minutes, thereby compelling the plaintiff to turn and drive up the right of way in order to cross the track. The plaintiff's horse became frightened by an approaching freight train and ran into a barb-wire fence along the right of way and was injured. A judgment for the plaintiff was reversed by the upper court on the ground that the violation of the statute was not the proximate cause of the result, because such a result was not to have been foreseen. This is another case of mistaking the problem of the scope for the protection for one of causal connection. And it is another example of the mistake of saying that it is not proximate, because it is not forseeable. The comment

on the preceding case applies with equal force to the Lindsay case.

In *Chicago & Alton Ry.* v. *Becker,* 76 Ill. 25, the plaintiff's intestate, a boy of seven, with two other boys heard the whistle of the approaching train operated by the defendant and started for the crossing. The other two got across, but this boy stumbled and fell on the track when the engine was only sixty feet away. It was impossible to stop a heavy freight train in such a short distance and the boy was killed. In reversing a judgment for the plaintiff, the court held that there was no proximate cause, because the boy's contributory negligence was an intervening agency, and that there was no evidence of negligence on the part of the defendant. This was a case where the boy's own conduct defeated the protection afforded by the rule.

In *Hullinger* v. *Worrell,* 83 Ill. 220, the plaintiff sought to recover from the defendant, a sheriff, for an assault committed by B, a third person, upon the plaintiff, and for the expenses incurred by the plaintiff in having B bound over to keep the peace. The negligence of the defendant was predicated upon his permitting B to escape while in his custody, previous to said assault. The court sustained a demurrer to the declaration, and gave judgment for the defendant. The upper court, in affirming the judgment, said that since the plaintiff was not a party to the criminal proceedings under which B was held in custody, the escape of B was no legal injury to him, and that the subsequent assault by B on the plaintiff and the procuring B to be bound over were not the proximate consequences of the defendant's negligence in permitting B to escape, nor was the escape the proximate cause thereof. The vital question was whether the plaintiff's interest was protected against the particular hazard encountered here. In the case of the plaintiff's being intentionally and wilfully assaulted by a third party, the court would probably hold that the harm re-

ceived was not a hazard protected against by the rule invoked.

In *Strojny* v. *Griffin Wheel Co.,* 116 Ill. App. 550, the plaintiff sought to recover for injuries received as a result of the act of a fellow-servant in knocking off a piece of hot metal from a tub used to convey the molten metal, while he and the plaintiff were engaged in cleaning said tubs. The piece of hot metal struck and injured the plaintiff. The negligence of the defendant was predicated upon its failure to provide sufficient workmen. The upper court, in affirming a judgment for the defendant, held that the lack of help was not the proximate cause, and that there was no evidence of any negligence on the part of the defendant. Here again the interest of the plaintiff was not protected against the particular harzard, the negligence of a a fellow-servant.

In *Lorette* v. *Director General,* 306 Ill. 348, the plaintiff was climbing through a train of cars at a crossing, in violation of a statute, when the cars started suddenly and threw him under the moving wheels and injured him. The Court, in affirming a judgment for the plaintiff, held that the mere fact that the plaintiff was violating a statute at the time would not bar his recovery, unless it was the proximate cause of the accident. "If the illegal act is a mere condition which made it possible for the accident to occur but no part of it, it will not bar the plaintiff." The plaintiff was protected against the hazard because his conduct did not defeat the protection afforded.

The last group of cases to be considered deal with the question as to whether the negligence which puts life and property in danger is the proximate cause of injuries sustained in a reasonable attempt to avoid the peril, or to save the property. In *Pullman Palace Car Co.* v. *Laack,* 143 Ill. 242, the plaintiff was a foreman for the defendant, in charge of a brick kiln which was heated by oil. When, owing to the faulty construction of the oil-bur-

ners, a fire broke out that threatened to spread to, and cause the explosion of, a car filled with oil, that was standing near, and was connected with the oil-burners by means of a supply-pipe, the plaintiff ordered one of his men to cut off the supply of oil, by shutting a valve on the car. Upon being assured that the oil was shut off, the plaintiff went under the car to disconnect the supply-pipe, but when he had disconnected the supply-pipe he discovered that the oil had not been shut off, and it poured out over his clothing, which caught fire, seriously burning him. The Court, in affirming a judgment for the plaintiff, held that the injury was due to the concurrent acts of negligence of the master and the fellow-servant, and that each was liable, jointly and severally. It also said that the plaintiff was justified in attempting to save the property of his master. The decisive point is not causal connection, but whether the hazard was within the scope of the protection, and whether the plaintiff's conduct had defeated the protection afforded.

In *I. C. R. R.* v. *Siler,* 229 Ill. 390, sparks from an engine operated by the defendant set fire to rubbish that the defendant had permitted to accumulate along its right of way, from where it spread to the premises of the plaintiff's intestate, and threatened to destroy her house. In attempting to stop the progress of the fire, by raking leaves around her house towards the fire, her clothing caught fire and she was burned to death. The Court, in affirming a judgment for the plaintiff held that the defendant's negligence was the proximate cause of the injury, as it was to have been anticipated that she would attempt to save her property from the fire. No cause issue is involved. The first question was whether the hazard fell within the scope of the protection, and the second question was whether the defendant should have anticipated injury to the plaintiff's person from the accumulation of the rubbish. Negligence was the only real issue in the case.

In *Landgraf* v. *Kuh,* 188 Ill. 484, the plaintiff's intestate, who was working in a building owned by the defendant when a fire broke out, attempted to get out by a window by means of a fire-ladder, but it collapsed when someone below jumped on it, and the plaintiff's intestate fell to the sidewalk below and was killed. The defendant's negligence was predicated on his failure to provide fire-escapes as required by law. The trial court directed a verdict for the defendant. The upper court, in reversing the judgment for the defendant, held that it was reversible error to take the question of proximate cause from the jury, and that the effort to escape in some other way might have been caused by the absence of fire-escapes. Again, no cause issue is involved. The first question is whether the interest affected fell within the protection of the rule, and the other question is whether the defendant should have anticipated injury to the person of the plaintiff's intestate from the absence of fire-escapes.

It will have occurred to the reader by this time that the grouping of the cases in this article, which has been done in accordance with the most approved and generally accepted rules of proximate cause, as laid down by Judge Cooley in his work on Torts, has actually separated, instead of bringing together, cases that involved the same problem, as for instance: the cases involving the construction of the Dram Shop Act. This was done purposely, in order to demonstrate the utter lack of any rational principle underlying the orthodox method of handling the problem of causal relation. Instead of clarifying the problem, the orthodox rules only add to the confusion already so prevalent.

It must be apparent by this time that the reviewing courts, in passing upon the scope of the protection to be given an interest, always treat it as a question of causal connection, and discuss it in the old, time-worn terminology of proximate cause. They never seem to see the

humor of the situation. It must also be obvious by this time that the question of causal relation is really not involved at all in the great majority of the cases. One of the reasons why the courts persist in treating this problem as one of causal relation is found in the reluctance of the courts to admit that they are making the law, by what has been aptly termed judicial legislation, when they are defining the limits of the protection to be given an interest by a statute or by a rule of the common law.

As to the problem whether proximate cause is a question of fact for the jury, or a question of law for the court, the conclusion to be drawn from the cases is that, when the reviewing court determines that the hazard encountered is within the range of the rule, then the finding of the jury that there was proximate cause is final and conclusive, but when the court determines that the hazard encountered is not within the range of the rule, then the finding of the jury that there was proximate cause is reversed as not supported by the evidence. This is not rational, and can produce nothing but confusion, because in one case the finding of the jury is final and conclusive, and in the next case it may be reversed. All this confusion is the natural and proximate result of the irrational orthodox method of determining the answers to the many questions involved in a tort action by assuming them to be questions of causal relation. And until the trial court, in its judicial function, frankly meets and answers the questions: Has the plaintiff a legal right? and, Is that right protected against the particular hazard encountered? we shall not have any clarification of the law as regards the question of proximate cause.