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House v. Kellerman: Judge, Jury, and Intervening Cause in Kentucky Negligence Law

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COMMENTS

HOUSE V. KELLERMAN: JUDGE, JURY, AND INTERVENING CAUSE IN KENTUCKY NEGLIGENCE LAW

I. INTRODUCTION

One of the law's chief sources of delight and frustration is the ease with which subjects essentially philosophical become charged with practical consequences. One such subject is the relationship between an act and its consequences, the problem of cause. Since the time of Bacon, we have taken it as true that *"[i]n jure non remota causa, sed proxima, spectatur,"*[1] in law the near cause is looked to, not the remote. Though few would dispute this maxim's truth, its utility is limited by the difficulty of deciding the difference between the near cause and the remote before looking to either. This difference has fascinated the law for centuries. The best legal minds have grappled with it,[2] philosophers have analyzed it,[3] and students have despaired of ever understanding it. A reflection of this fascination is the mountain of literature the subject has engendered,[4] the weight

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[1] Quoted in W. PROSSER, THE LAW OF TORTS § 42, at 244, n.63 (4th ed. 1971) [hereinafter cited as PROSSER].

[2] *See generally* PROSSER § 41; 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 20.1 (1956). The most useful guide to the area of proximate cause is H. HART & A. HONORE, CAUSATION IN THE LAW (1959)[hereinafter cited HART & HONORE] which is a valuable survey of the whole question of cause in both British and American law. Books presenting a more specific point of view include: A. BECHT & F. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961); L. GREEN, RATIONALE OF PROXIMATE CAUSE (1927); and R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963). Of these, Green gives the broadest treatment. BECHT & MILLER present an interesting approach to analysis of the question of cause which may, however, frustrate those seeking something immediately useful since most of the analysis is done with hypothetical, not actual, cases. KEETON is a brief (123 page) treatment of risk analysis.

As might be expected, articles abound. An excellent, if somewhat polemical, survey of the various approaches to the question of cause is Probert, *Causation in the Negligence Jargon: A Plea for Balanced "Realism,"* 18 FLA. L. REV. 369 (1965). Other recent discussions include Cole, *Windfall & Probability: A Study of "Cause" in Negligence Law*, 52 CAL. L. REV. 459 (1964); Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); and Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956).

[3] For a good discussion of these philosophers, see HART & HONORE, ch. 1.

[4] *See* note 2, *supra*. For a more inclusive sample, see PROSSER § 41, at 236, n. 1.

of which would have buried a less elusive subject long ago. That more and more continues to be written suggests the magnitude of the subject and the hopelessness of ever analyzing it conclusively.[5] As the Supreme Court of Minnesota once noted, "[c]ause seems to be one of those elemental concepts that defies refined analysis but is known intuitively to common sense."[6]

In a recent case, *House v. Kellerman*,[7] the Kentucky Court of Appeals addressed one facet of the problem of causation in the law: the division of labor between the judge and jury in deciding the question of liability for negligent conduct. In ruling that the judge and not the jury should decide the question of whether an intervening act may supersede the conduct of a negligent party, the Court made a procedural change of some importance and hinted strongly that a reanalysis of the whole question of cause was being considered. The sources of this procedural change and the reanalysis of cause implied by the Court are the subject of this paper.

II. *House v. Kellerman*: THE CASE AND ITS RATIONALE

On the afternoon of November 13, 1969 Leslye Hill was returning to her home in Lexington from northern Kentucky on I-75 with her friend Janice M. House asleep in the front seat beside her. It was raining heavily. As Leslye passed two trucks, her car suddenly began to skid, went out of control, and ran into the median. It then came back onto the road where it was struck by the car of Marcus Kellerman. He braked but was unable to avoid the collision. Janice was thrown from the car and killed along with her unborn infant. Her husband, acting as administrator of their estates and suing in his own behalf,

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[5] Contemplation of this truism seems to lead occasionally to despair. "Few judges of today would seriously question the observation that the phrases of proximate cause are little more than gaudy ribbons with which the package of liability may be decorated once its contents have already been fixed by the court through resort to some other mystique." Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363, 364 (1970).

[6] Dellwo v. Pearson, 107 N.W.2d 859, 861 (Minn. 1961).

[7] 519 S.W.2d 380 (Ky. 1974). In November 1975 Kentucky voters passed a constitutional amendment reorganizing the Kentucky Court System. The Court of Appeals referred to here is the old Court of Appeals, at that time the state's highest appellate court.

brought an action for damages against both Leslye Hill and Marcus Kellerman.

At trial, Leslye Hill testified that when she began to slide, she called out "Janice" who then awoke and grabbed her arm. She further testified that until Janice grabbed her arm, the car was under control.[8] The court instructed the jury on the duties of ordinary care of both defendants, on the possible contributory negligence of Janice House, and on the last clear chance and sudden emergency doctrines as to Kellerman. The fifth instruction stated, in effect, that if the jury found that the accident was caused *solely* because Janice grabbed Leslye Hill's arm, it should find for the defendants.[9] In a verdict for the defendants, the jury specified that it so found under In-

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[8] "Q. Do you feel that you could have controlled the car if she had not grabbed your arm?" A. "Yes, I do." Brief for Appellee at 4, House v. Kellerman, 519 S.W.2d 380 (Ky. 1974).

[9] Even though you may believe from the evidence that the Defendant, Leslye M. Hill, was negligent within the meaning of Instruction No. 1, and the defendant, Marcus Kellerman, was negligent under Instruction No. 2, and if you further believe from the evidence that the accident was caused and brought about *solely* by the decedent, Janice House, grabbing the arm of her driver, Leslye M. Hill, and thereby causing said automobile to go out of control, resulting in the accident about which you have heard evidence, then you will find a verdict for all of the Defendants. (emphasis added) (Tr. Ev. 108). *Id.*, at 1.

As the Court points out, both sides objected to this instruction on appeal, 519 S.W.2d at 382. The instruction was apparently given at the suggestion of Kellerman with the addition of "solely" suggested by the attorney for House. Brief for Appellee, at 14.

The use of "solely" probably made the instruction defective under Kentucky law although the Court found the instruction defective on other grounds, 519 S.W.2d at 382. In Campbell v. Markham, 426 S.W.2d 431 (Ky. 1968), another negligence case, the appellant argued that the jury was misled by an instruction implying that his contributory negligence must have been the proximate cause of the accident. Justice Palmore, dismissed appellant's argument noting:

> Appellants object to the quoted portion of the instruction on the theory that it required Markham's negligence (if any) to be *the* proximate cause of the accident in order for the jury to find against him on the ground of contributory negligence. If that were the case, the objection would be well taken. However, the instruction says "*a* proximate cause," not "*the* proximate cause." *Id.* at 438.

The appellant in *House v. Kellerman* did not complain of the substance of the instruction since he apparently requested the objectionable language himself and did not object to it at trial as did the defendant. Under KY. R. CIV. P. 51(3) he would have been estopped from doing so. Although the Court could have considered this problem without the objection to correct a point of law, as it did in Cox v. Cooper, 510 S.W.2d 530, 533 (Ky. 1974), it chose to decide the case on other grounds.

struction No. 5. On appeal the Court reversed, finding that the instruction was erroneous and holding that the question of whether an undisputed intervening act was a superseding cause is a question of law and therefore properly for the court and not the jury to decide. Cases to the contrary were overruled.[10]

The Court based its decision on three aspects of the charge which it was felt rendered it defective. The first was that the charge was inherently redundant.

> An instruction telling the jury that if the accident resulted from a cause for which a party was *not* responsible it shall find for the defendant is needless, because it has been instructed elsewhere that it shall find against him only if it believes from the evidence that the cause was one for which he *was* responsible.[11]

This redundancy was considered to have a prejudicial effect: ". . . it is prejudicial because it gives undue emphasis to the evidence on which the defendant relies in contending that his fault, if any, was not a legal cause."[12]

The second aspect of the instruction to which the Court objected was based on the difficulty of framing an instruction on superseding cause which outlined the concepts involved sufficiently and which was at the same time comprehensible to jurors.[13] The Court pointed to the "complexity and abstract nature of the various criteria for intervening and superseding causation,"[14] observed that the "ordinary prudent person" test was hard enough for the jury, and concluded that the question ". . . cannot be practically fitted into instructions to juries."[15]

The Court implied that a final defect in the instruction was a misconception of the nature of cause itself. In noting

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[10] Seelbach v. Cadick, 405 S.W.2d 745 (Ky. 1966); Hines v. Westerfield, 254 S.W.2d 728 (Ky. 1953); Bosshammer v. Lawton, 237 S.W.2d 520 (Ky. 1951).

[11] House v. Kellerman, 519 S.W.2d 380, 382 (Ky. 1974).

[12] *Id.*

[13] In this regard it is interesting to recall that Justice Palmore, who wrote the opinion, has spent considerable time in recent years considering jury instruction in general in his supplementation of O. STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY (Supp. 1973-74) and his current revision of the whole work, one volume of which, J. PALMORE & R. LAWSON, KENTUCKY CRIMINAL INSTRUCTION TO JURIES (1975), has been published.

[14] House v. Kellerman, 519 S.W.2d 380, 382 (Ky. 1974).

[15] *Id.*

generally that " . . . there can never be only one 'cause' of any result,"[16] the Court pointed out that "[t]he law seeks out only the collective cause or causes for which it lays responsibility on some person or persons."[17] By emphasizing one of the many causes of a result, a superseding cause instruction implies that one cause may overcome another. The correct analysis, the Court said, concludes in finding responsibility for the result, not its causes.[18] In addition to being redundant, prejudicial, and complicated, therefore, the Court concluded that the instruction offered the wrong analysis to be used for the allocation of responsibility.[19]

The cure for these defects was the reallocation of the burden of deciding whether an intervening cause is a superseding one from the jury to the judge. Instead of being a factual question as it had been previously thought, the question was determined to be one of law.[20] An instruction was held to be necessary, therefore, only when there is a question of whether an event occurred.[21] If the Court believes that the intervening cause was not a superseding one, or if reasonable minds could differ on the question, it should be submitted to the jury for it to decide whether the defendant's negligence was a "substantial factor" in the plaintiff's injury.[22] With this analysis as a guide, the Court concluded that Janice House's act was not a superseding cause overriding Leslye Hill's antecedent negligence[23] and remanded the case to the circuit court with suggested instructions embodying the principles outlined in the opinion.[24]

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[16] *Id.*

[17] *Id.*

[18] "The law seeks out only the collective cause or causes for which it lays responsibility on some person or persons. A lawsuit seeks only to find a resting place among the parties for that responsibility. The function of instructions is to ascertain whether it falls on the defendant." *Id.*

[19] The skeptical reader may feel the last point to be the result of a torturous reading of some very general language in the opinion. An analysis of the possible sources of this language found *infra* may resolve some of this doubt.

[20] House v. Kellerman, 519 S.W.2d 380, 382 (Ky. 1974).

[21] *Id.* at 383.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 384-85. The case was remanded to determine if Leslye Hill was negligent and if so, whether this was a substantial factor in causing the accident; whether Kellerman was negligent; if both were negligent, which was the more negligent; and

III. DEFECTS IN THE INSTRUCTION

In ruling that the instruction given in *House v. Kellerman* was erroneous, the Court pointed to three defects: redundancy, complexity, and a misapprehension of the true nature of cause.[25] A more complete analysis of these defects is necessary if they are to be properly understood.

A. *Prejudicial Redundancy*

Repetition in instructions has long been held to be improper but is usually considered to be harmless unless it unnecessarily prejudices the defendant.[26] Until recently, the Kentucky Court has usually been unwilling to find such prejudice. In the case of *Deegan v. Wilson*,[27] for example, a case involving the accidental death of a bicyclist, the Court held that separate instructions on contributory negligence, last clear chance, and the duties of the deceased were not prejudicial although redundant.

> It may be true that the instructions were redundant and repetitious in the particulars complained of, but they correctly presented the crucial issue . . . and, on the whole, could not have misled the jury . . . .[28]

In *Dean v. Martz*,[29] however, a different result was reached when the lower court instructed on both contributory negligence and assumption of the risk. The Court felt that the instructions gave an unwarranted emphasis to the arguments of the defense, which confused the jury.[30] Similarly, in *Cox v.*

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to award appropriate damages. On remand the case was settled out of court according to defense attorney Charles Landrum, Jr.

[25] *See* notes 11-19, *supra*, and accompanying text.

[26] *See* 88 C.J.S. *Trial* § 334, 874 (1955). "[I]t has been held that mere repetition of an instruction does not lay undue stress or prominence on particular matters, notwithstanding one instruction would be sufficient.

. . . [T]he question is whether there is such undue emphasis of repeated matter as to mislead the jury" (footnotes omitted). *Id.* at 875. *See also* 75 AM. JUR. 2d *Trial* § 630 (1975). For Kentucky instructions see 1 O. STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY § 17, at 32 (1957).

[27] 157 S.W.2d 68 (Ky. 1942).

[28] *Id.* at 70.

[29] 329 S.W.2d 371 (Ky. 1959).

[30] *Id.* at 375.

Cooper,[31] an instruction that the jury must find against either codefendant or against both was held erroneous because it ignored the plaintiff's burden of proof.[32] The objectionable redundancy in both these cases involved the imposition of otherwise acceptable instructions on one another with resulting prejudicial error. In *House v. Kellerman*, the redundancy was seen as inherent in a single instruction. In this it is similar to *Wooten v. Legate*,[33] a case decided the same day as *House* and one which, like *House*, abolished a previously acceptable instruction, this one on unavoidable accidents.

An unavoidable accident has been defined, appropriately, as "one from which there is no escape."[34] In Kentucky the concept has been relatively unimportant, and most cases discussing it have merely pointed out its inapplicability to a particular set of facts.[35] There are cases, however, in which it has been held to apply.[36] In 1973, Justice Palmore, speaking for the Court, while deciding the case on other grounds, indicated that the instruction was probably inherently defective in that it gave the defendant an advantage by placing unnecessary emphasis on his evidence.[37] This was in line with a recent trend in other jurisdictions abolishing the instruction.[38] In *Wooten v.*

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[31] 510 S.W.2d 530 (Ky. 1974).

[32] *Id.* at 534. "The fallacy of the foregoing statement is that it overlooks the burden of proof. Though it may be uncontroverted that either A or B or both were negligent and that such negligence caused C's injuries, a verdict against either one must be predicated on the jury's belief from the evidence that he in particular was negligent. The certain knowledge that one or both were guilty cannot sustain the burden against either individual. . . . The practical result of this type of instruction is to shift the burden to the defendants . . . ."

[33] 519 S.W.2d 385 (Ky. 1974).

[34] E.P. Barnes & Bro. v. Eastin, 227 S.W. 578, 580 (Ky. 1920).

[35] Bryant v. Conrad, 420 S.W.2d 666, 669 (Ky. 1967); Dunning v. Kentucky Utilities Co., 109 S.W.2d 6, 10 (Ky. 1937); Beaver Dam Coal Co. v. Daniel, 13 S.W.2d 254, 256 (Ky. 1929); E.P. Barnes & Bro. v. Eastin, 227 S.W. 578, 580 (Ky. 1920); Alexander v. Humber, 6 S.W. 453, 455 (Ky. 1888).

[36] *Cf.* Massey v. Salmon, 277 S.W.2d 49, 52 (Ky. 1955). *But see* Johnson v. Brey, 438 S.W.2d 535 (Ky. 1969); Sloan v. Iverson, 385 S.W.2d 178 (Ky. 1964).

[37] Harris v. Thompson, 497 S.W.2d 422, 428 (Ky. 1973). "[T]hat an accident was unavoidable merely negates the existence of negligence as a causative factor. As such, it does not require an instruction, and the giving of one has the possible prejudicial effect of placing undue emphasis on the defendant's evidence tending to explain *why* he was not negligent."

[38] Butigan v. Yellow Cab Co., 320 P.2d 500 (Cal. 1958); Lewis v. Buckskin Joe's Inc., 396 P.2d 933 (Colo. 1964); Graham v. Rolandson, 835 P.2d 263 (Mont. 1967); Fenton v. Aleshire, 393 P.2d 217 (Ore. 1964).

Legate,[39] a Volkswagen bus driven by the defendant, Legate, collided with a black horse in the early morning darkness. The Court of Appeals held the lower court's instruction on unavoidable accident was prejudicial error. Concluding that the instruction was unnecessary, Commissioner Catinna pointed out that " . . . that which is unavoidable means only that the person charged is without negligence. The usual instructions concerning negligence of the parties very adequately serve the purpose of negating negligence on the part of one or all the parties where justified by the evidence."[40]

As in *House v. Kellerman*, the defect in the instruction in *Wooten* was inherent in the instruction itself because of the emphasis it placed on the evidence of one of the parties. This is unlike the redundancy in *Dean v. Martz*.[41] As Justice Palmore pointed out in *House*, the instruction on superseding cause "is prejudicial because it gives undue emphasis to the evidence on which the defendant relies in contending that his fault, if any, was not a legal cause. In this respect there is a direct analogy between the theories of superseding cause and unavoidable accident."[42]

B. *Complexity*

According to Stanley's *Instructions to Juries in Kentucky*, instructions " . . . should be so clear, concise and definite as to present concretely the issues supported by evidence and the applicable law in such a way as will be readily within the comprehension and understanding of the jurors . . . . "[43] The

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[39] 519 S.W.2d 385 (Ky. 1974).

[40] Wooten v. Legate, 519 S.W.2d 385, 386 (Ky. 1974). Whether the emphasis given by the instruction is prejudicial is arguably dependent on point of view. Plaintiffs' lawyers would agree with the Court. *See* M. BELLI, MODERN TRIALS § 35, 175 (1954). "It seems to the author that instructions on contributory negligence, assumption of risk and unavoidable accident, all applied to the same defense and factual situation, and frequently argumentative, are unfair to the plaintiff and unduly persuasive in favor of the defense."

Defense lawyers would obviously take the opposite view. *See* Brief for Appellee Mullins at 20, Wooten v. Legate, 519 S.W.2d 385 (Ky. 1974), where counsel suggests that the instruction is helpful to point out the correct burden of proof.

[41] 329 S.W.2d 371 (Ky. 1959).

[42] 519 S.W.2d 380, 382 (Ky. 1974).

[43] O. STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY § 17, at 32 (2d ed. 1957). *See also* 88 C.J.S. *Trial* § 327 (1955): "A charge to the jury should be sufficient in its

desirability of having the jurors understand the instructions given them is apparent, and the confusion and uncertainty which can result when the instructions are not understood should obviously be avoided.[44] It is a different matter, however, to assert that because of the complexity of the law, a proper instruction cannot be fashioned. Such, however, is clearly part of the rationale of *House v. Kellerman.*

> Considering the complexity and abstract nature of the various criteria for intervening and superseding causation . . . the disposition of this court to treat the question as a legal rather than a factual issue reflects the inevitable vicissitudes of life. It is enough to tax jurors with the problems of what an "ordinarily prudent person" would have done under similar circumstances, and whether a party's failure to meet that standard was a "substantial factor" in causing the accident, without requiring it to answer such abstruse inquiries as whether the consequences of an intervening force or circumstance "appear after the event to be extraordinary rather than normal," or "highly extraordinary."[45]

The questions this approach raises go to the heart of the utility of the civil jury and far beyond the scope of this comment.[46] There exists, however, some precedent for such a position in Kentucky law. Civil Rule 39.01(3), for example, states:

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language to enable an average lay mind, not acquainted with the technicalities of the law, to understand thoroughly the different phases of the case concerning both fact and law . . . ."

[44] For an example of the unfortunate effects of such confusion see NEWSWEEK, October 20, 1975, at 64 for a case in which the jury, apparently baffled by instructions in a murder case, found the defendant guilty of manslaughter when they meant to find him innocent. For an old Kentucky case see Alexander v. Humber, 6 S.W. 453 (Ky. 1888) in which the jury found for the plaintiff against codefendants. Damages were assessed at $1000 "jointly." Later the same day after being discharged, the jury returned to the judge with the news that what they had meant was "severally." The Court refused to reverse.

[45] 519 S.W.2d 380, 382 (Ky. 1974).

[46] Literature on the subject is vast. The question is obviously one over which reasonable minds may differ. *Compare* Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483 (1956):

> To citizens generally, jury trial has given a sense of political freedom; a feeling of being part of the government. It offers an assurance of judgment by neighbors who understand the community climate of values, a bulwark against the petty tyrannies of headstrong judges, and a means of softening the cold letter of the law in cases of hardship.

with the views of Judge Jerome Frank in LAW AND THE MODERN MIND (1935): "Proclaiming that we have a government of laws, we have, in jury cases, created a government of often ignorant and prejudiced men." *Id.* at 178.

> The trial of all issues . . . shall be by jury, unless . . . the court upon motion or its own initiative finds that because of the peculiar questions involved, or because the action involves complicated accounts, or a great detail of facts, it is impracticable for a jury intelligently to try the case.

Unlike most of Kentucky's civil rules, there is no parallel for Rule 39.01(3) in the Federal Rules of Civil Procedure; it is based instead on the old Civil Code section 10(4).[47] The section was originally intended to apply to cases in equity[48] and was originally so interpreted.[49] Its mandate might be more broadly interpreted, however.[50] Although the rule was not cited in *House*, it is an indication of a disposition on the part of the legislature to treat complicated questions as questions of law. The Court in *House v. Kellerman* clearly concurred with that disposition.[51]

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[47] KY. REV. STAT. ANN. RULE CIV. PROC. 39.01 (1969). The 1952 Committee notes state:

> Under Federal Rule 53 the court may refer complicated ordinary actions to a commissioner. The parties can still demand a jury trial and in such event the commissioner's findings of fact may be read to the jury. The committee preferred to take such cases away from the jury in the same manner now provided in Civil Code section 10(4). *Id.*

[48] *Id.*

[49] O'Connor v. Henderson Bridge Co., 27 S.W. 251, 253 (Ky. 1894).

[50] For a discussion of the constitutional questions involved in a broader interpretation, *see* Sower, *"Complicated Issues" v. The Right to a Jury Trial: A Procedural Remnant in Kentucky Law Raises Constitutional Problems*, 3 N. KY. L. REV. 171 (1976).

[51] For another case reaching the same conclusion see Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493 (Ky. 1975), in which the Court again held that the complexity of the law prevented successful instruction. In the determination of whether or not an insurance company's failure to settle a claim was in bad faith, the Court, through Justice Stephenson, noted:

> The difficulty in applying the test rests in the ability of the fact-finder to apply it . . . .
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> . . . We are of the opinion that a jury is just not equipped to evaluate the probable chances of recovery in a given case; nor is it equipped to properly weigh and evaluate this factor together with the other factors enumerated above. The issue of "bad faith" should be decided by the trial court. Only the trial court has the training and experience to properly apply these factors to a set of facts. *Id.* at 500.

Thus, there is some support for the suggestion that the Court is willing to listen to an argument that the jury is simply unequipped to decide questions in genuinely complex areas of the law under any instruction. For some scathing comments on such an approach in negligence cases see Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357 (1957); and Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482 (1956).

C. *A Misconception of the Nature of Cause*

Even when taken together, the redundancy and complexity of the jury instruction on superseding cause do not seem to call for the radical solution proposed in *House v. Kellerman.* In fact, more seems to have been on the Court's mind, and in announcing the holding of the Court, Justice Palmore raised the specter of an even more sweeping change:

> As a matter of fact, there is much to be said for the proposition that basic causation itself should be treated as a question of law, the jury deciding only the issues of negligence. However, we do not consider this to be an appropriate case in which to modify the existing practice in that respect.[52]

This would be a radical change indeed. To understand why it might be proposed, it is necessary to recall the elements of an action for negligence and the way in which those elements are usually applied.

IV. PROXIMATE CAUSE IN NEGLIGENCE CASES: A RECONSIDERATION

A. *The Role of Proximate Cause in the Law of Negligence*

Negligence, we are told by Dean Prosser, ". . . is simply one kind of conduct. But a cause of action founded upon negligence, from which liability will follow, requires more than conduct."[53] The elements he thinks necessary for liability are: (1) A duty or obligation recognized by law, (2) a failure to conform to the required standard, (3) a reasonably close causal connection between that failure and the injury, and (4) actual loss or damage.[54] The analysis in Kentucky seems more simple. As was said in *Warfield Natural Gas Co. v. Allen*:[55] "Actionable negligence consists of a duty, a violation thereof, and an injury. The absence of any one of these elements is fatal to the claim."[56]

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[52] 519 S.W.2d 380, 382 n.2 (Ky. 1975).

[53] PROSSER § 30, at 143.

[54] *Id.*

[55] 59 S.W.2d 534 (Ky. 1933). *See also* Illinois Central R.R. v. Vincent, 412 S.W.2d 874 (Ky. 1967); Williams v. Ehman, 394 S.W.2d 905 (Ky. 1965); Howard v. Fowler, 207 S.W.2d 559 (Ky. 1947); Chesapeake & Ohio Ry. Co. v. Carmichael, 184 S.W.2d 91 (Ky. 1944); Louisville & N.R.R. Co. v. Vaughn, 166 S.W.2d 43 (Ky. 1942); and Leonard v. Enterprise Realty Co., 219 S.W. 1066 (Ky. 1920).

[56] 59 S.W.2d 534, 536 (Ky. 1933).

Fatal also to the claim, however, is the absence of "proximate cause." "To make a party responsible for negligence, the negligence complained of must be the proximate cause of the injury."[57] A final analysis, important for the purposes of *House v. Kellerman*, is offered by Dean Leon Green, a lifelong student of torts and particularly of the question of proximate course.

> *First*, the plaintiff must show causal relation between the defendant's conduct and his injury. Sometimes this is difficult to determine . . . but is not so in most cases . . . . *Second*, the plaintiff must show the injuries he has suffered . . . . *Third*, There must be a duty owed the plaintiff by the defendant, covering the risk involved . . . . *Fourth*, the defendant must have violated his duty.[58]

The difference in this last analysis and the first two does not appear to be great. To those schooled in the vagaries of proximate cause, however, the assertion that the causal relation is sometimes "difficult to determine . . . but is not so in most cases" is an indication that he is not talking about Prosser's reasonably "close causal connection"[59] and Kentucky's "proximate cause" but about another question altogether, cause-in-fact.

B. *Proximate Cause and Cause-in-Fact*

It has been suggested that until the end of the 19th century courts used the term "cause" indiscriminately to express what they thought had happened and what the legal consequences of what had happened should be. "As it became increasingly obvious that no single expression could fully support the burden of both inquiries without confusion, legal science began to recognize two separate notions—cause-in-fact, and 'proximate' or 'legal' cause."[60] Put another way, the law may recognize an infinity of actual causes but will attach legal consequences only to those which it considers close enough to the result for liability.[61] Cause-in-fact, then, is just that—a fact. "Proximate

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[57] Current v. Cantrill, 8 Ky. Opin. 546 (1875). For a more recent reiteration see Campbell v. Markham, 426 S.W.2d 431, 439 (Ky. 1968).

[58] *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357, 359 (1957).

[59] PROSSER § 30, at 143.

[60] Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

[61] To begin with, literally speaking there can never be only one "cause"

cause," on the other hand "is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct."[62]

Many problems, of course, arise in the application of this analysis. One of these is the effect of an intervening force on the liability of a party whose negligence contributed to the injury complained of. This is the problem of superseding cause. As Justice Palmore correctly observed in *House v. Kellerman*, the legal analysis of this problem is remarkably abstruse.[63]

As defined by the second *Restatement of Torts*, superseding cause is ". . . an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."[64] The problem is in deciding when such an act has occurred,[65] a question usually resolved in terms of foreseeability,[66] a word which has been described as overworked and undefined[67] and one which by its function is actually measured by the application of hindsight.[68] *In Lloyd*

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of any result. Every cause is a collection of many factors, some identifiable and others not, all determined by prior events. The law seeks out only the collective cause or causes for which it lays responsibility on some person or persons.

House v. Kellerman, 519 S.W.2d 380, 382 (Ky. 1974).

[62] PROSSER § 41, at 236.

[63] 519 S.W.2d 380, 382 (Ky. 1974).

[64] RESTATEMENT (SECOND) OF TORTS § 440 (1965).

[65] RESTATEMENT (SECOND) OF TORTS § 442 (1965) gives the following criteria as helpful in the consideration of whether an intervening force is a superceding cause of harm to another:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation; (d) the fact that the operation of the intervening force is due to a third person's act or his failure to act; (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

[66] PROSSER § 44, at 272.

[67] *Id.*

[68] For a fuller discussion of foreseeability as it relates to *House v. Kellerman* see Ausness, *Torts: Kentucky Law Survey*, 64 KY. L.J. 201 (1976).

v. Lloyd,[69] a case in which a child fell from his grandfather's riding lawn mower, the Kentucky Court of Appeals observed: "That which is reasonably foreseeable is not an independent, intervening cause."[70] In the 1970 case of *Donegan v. Denney*,[71] the Court quoted the *Restatement* position with approval, indicating apparently that the foreseeability test should be followed in Kentucky.[72] Since *House v. Kellerman* only changes who decides the question of intervening cause and does not abolish the doctrine itself, *Donegan's* adoption of the foreseeability test has continued importance. Although the foreseeability of an event will no longer figure in jury instructions on intervening cause, the concept will remain critical in the determination of whether an intervening event is sufficient to remove a defendant's liability, a decision, of course, which will now be made by the courts.

C. *The Role of Judge and Jury*

The question of superseding cause, as part of the question of proximate cause, has long been considered a question for the jury in cases in which reasonable men could differ.[73] Even the Supreme Court has spoken on this point, proclaiming in *Milwaukee and Saint Paul Railway Co. v. Kellogg*[74] that

> . . . what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it . . . . The question always

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[69] 479 S.W.2d 623 (Ky. 1972).

[70] *Id.* at 626. Other Kentucky cases addressing the problem of superseding cause are: Donegan v. Denney, 457 S.W.2d 953 (Ky. 1970); Illinois Cent. R.R. v. Vincent, 412 S.W.2d 874 (Ky. 1967); Commonwealth v. Graham, 410 S.W.2d 619 (Ky. 1966); Seelbach, Inc. v. Cadick, 405 S.W.2d 745 (Ky. 1966); Mackey v. Allen, 396 S.W.2d 55 (Ky. 1965); Lexington Country Club v. Stevenson, 390 S.W.2d 137 (Ky. 1965); United Fuel Gas Co. v. Thacker, 372 S.W.2d 784 (Ky. 1963); Milliken v. Union Light, Heat & Power Co., 341 S.W.2d 261 (Ky. 1960); Carr v. Kentucky Utilities Co., 301 S.W.2d 894 (Ky. 1957); Smith's Adm'r v. Corder, 286 S.W.2d 512 (Ky. 1956); Louisville and N. R.R. Co. v. Powers, 255 S.W.2d 646 (Ky. 1953); Hines v. Westerfield, 254 S.W.2d 728 (Ky. 1953); Bosshammer v. Lawton, 237 S.W.2d 520 (Ky. 1951).

[71] 457 S.W.2d 953 (Ky. 1970).

[72] *Id.* at 958.

[73] PROSSER § 45, at 289.

[74] 94 U.S. 469 (1876).

> is, was there an unbroken connection between the wrongful act and the injury, a continuous operation?[75]

This is the position of the second *Restatement of Torts*[76] and of the overwhelming number of American jurisdictions.[77] Kentucky has agreed for some time.[78] In *Hines v. Westerfield*,[79] a 1953 case in which a truck, out of its lane because of a negligently parked car, was forced off the road by an oncoming car, the Court of Appeals commented: "The question we have to determine is: 'Was such intervening negligence the superseding cause of the accident?' The question is primarily one of fact."[80] Likewise, in *Seelbach, Inc. v. Cadick*[81] the Court observed: "We are not undertaking to decide these issues of proximate or intervening cause because we think it clear that reasonable minds could differ in their determination."[82]

As long as proximate cause is described as a question of fact, it will almost necessarily be for the jury for, as Lord Coke said, "*ad quaestionem facti non respondent judices*" and "*ad quaestionem juris non respondent juratores*,"[83] judges do not

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[75] *Id.* at 474-75.

[76] RESTATEMENT (SECOND) OF TORTS § 453 (1965).

[77] There is universal agreement that proximate cause is a question of fact for the jury if reasonable minds could differ. When reasonable minds could not, of course, is a decision the court alone can make. Even Oregon, which has attempted to abolish proximate cause, still agrees that the question, if raised, is for the jury. *See* Pattle v. Wildish Constr. Co., 529 P.2d 924 (Ore. 1974). More will be said about Oregon's abolition of proximate cause. *See* notes 117-122 *infra* and accompanying text.

[78] *See* the leading case of Watson v. Kentucky & Indiana Bridge & Ry. Co., 126 S.W. 146, 150 (Ky. 1910) where the Court commented in a superseding cause case: "The question of proximate cause is a question for the jury."

[79] 254 S.W.2d 728 (Ky. 1953).

[80] *Id.* at 729. *See also* S.W. Corum Hauling, Inc. v. Tilford, 511 S.W.2d 220 (Ky. 1974); Donegan v. Denney, 457 S.W.2d 953 (Ky. 1970); Croushorn Equipment Co. v. Moore, 441 S.W.2d 111 (Ky. 1969); Commonwealth Dep't of Highways v. Graham, 410 S.W.2d 619 (Ky. 1966); Mackey v. Spradlin, 397 S.W.2d 33 (Ky. 1965); Roberts v. Taylor, 339 S.W.2d 653 (Ky. 1960); Lexington Glass Co. v. Zurich Gen. Accident & Liab. Ins. Co., 271 S.W.2d 909 (Ky. 1954); Estes v. Gibson, 257 S.W.2d 604, 36 A.L.R.2d 729 (Ky. 1953); Hines v. Westerfield, 254 S.W.2d 728 (Ky. 1953); Bosshammer v. Lawton, 237 S.W.2d 520 (Ky. 1951).

[81] 405 S.W.2d 745 (Ky. 1966).

[82] *Id.* at 750. *See also* Glasgow Realty Co. v. Metcalfe, 482 S.W.2d 750 (Ky. 1972); Ohio Cas. Ins. Co. v. Commonwealth, 479 S.W.2d 603 (Ky. 1972); O'Connor & Raque Co. v. Bill, 474 S.W.2d 344 (Ky. 1971); Carruba v. Speno, 418 S.W.2d 398 (Ky. 1967); Commonwealth Dep't of Highways v. Graham, 410 S.W.2d 619 (Ky. 1966).

[83] Quoted in Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966).

answer questions of fact, jurors do not answer questions of law. The usefulness of this distinction is uncertain but has become such a part of the fabric of our jurisprudence that it is hardly subject to criticism. Perhaps this is as it should be. As Dean Green observed in 1930:

> No two terms of legal science have rendered better service than "law" and "fact." They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we desire to give them. In them and their kind a science of law finds its strength and durability. They are the creations of centuries. What judge has not found refuge in them? The man who succeeded in defining them could be a public enemy.[84]

Even though proximate cause is a question of fact, courts have shown time and again their willingness to consider the problem themselves.[85] Thus it was said in *Tolin v. Terrell*[86] ". . . where the evidence connecting the plaintiff's injuries with the defendant's alleged negligence amounts to mere speculation or conjecture, no case for the jury is presented."[87] In fact, in Kentucky, as the Court noted in *House v. Kellerman*,[88] proximate cause is usually decided by the Court as a matter of law when it comes before it on appeal.[89] This is not the same as declaring it to be a question of law in all cases, however.

The chief criticism of proximate cause as a question of fact is the difficulty of defining it adequately, both for the jury and for the courts. As Prosser notes: "There is a decided tendency to leave every question to the bewildered jury, under some vague instruction which provides no effective guide."[90] A large

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[84] GREEN, JUDGE AND JURY 270 (1930). Quoted with trepidation in Weiner, *supra* note 83 at 1869.

[85] For Dean Green's unhappiness with appellate court interference with jury verdicts, see Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357 (1957), and Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 485 (1956).

[86] 117 S.W. 290 (Ky. 1909). In this case the gray mare of a ferry owner bit the rump of the plaintiff's mule. The mule then kicked the plaintiff and injured him. The jury found for the plaintiff but the Court reversed.

[87] *Id.* at 291.

[88] 519 S.W.2d 380, 382 (Ky. 1974). "As in nearly every case in which the specific question of superseding cause has arisen, it was decided as a matter of law."

[89] *Id. See* Donegan v. Denney, 457 S.W.2d 953 (Ky. 1970).

[90] PROSSER § 45, at 289 (notes omitted).

part of the problem, of course, is that "proximate cause" is so easily confused with "cause-in-fact." It has been pointed out that "the word 'cause' is one that the law has borrowed from the layman's terminology, and this child of the street, unlike the artificial creatures of our professional vocabulary, simply will not behave."[91] Those who tend to lay great stress on cause as a question of fact[92] seem to forget the difficulty of defining either "cause" or "fact" and show, in one commentator's words, "an unjustified faith in our underdeveloped nonmathematical legal language."[93] Balanced against these considerations is the belief, often expressed,[94] that the jury functions best in negligence cases by bringing "the common sense wisdom of the layman to bear on the problem of evaluating conduct."[95] Thus, an inevitable conflict is set up. On one hand the jury is believed to be best suited for the solution of negligence questions; on the other the means by which it decides the question, an instruction on proximate cause, is accused of being imprecise.

One solution to this conflict is to ignore it, leaving it for the appellate court to decide whether the jury acted reasonably under the instructions.[96] This approach, although traditional, can be criticized for encouraging capriciousness. Given the illusive nature of proximate cause, the results will often be uncertain and unpredictable although an appearance of certainty is maintained.

A second solution is to declare the question of proximate cause to be one of law and therefore for the court, the position of *House v. Kellerman*.[97] Since this does not change the traditional analysis of proximate cause, the main objection to this approach is that it takes from the jury something which has traditionally been a question of fact.[98] The advantage of such

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[91] Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 61 (1956).

[92] *See* BECHT & MILLER, *supra* note 2.

[93] Probert, *Causation in the Negligence Jargon: A Plea for Balanced "Realism,"* 18 FLA. L. REV. 369, 370 (1965).

[94] *See* J. FLEMING, THE LAW OF TORTS 253 (4th ed. 1971).

[95] James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 685 (1949).

[96] For a suggestion that courts may prefer things this way, see Probert, *supra* note 2 at 390.

[97] 519 S.W.2d 380, 382 (Ky. 1974).

[98] At least one court has held that questions of negligence and causation are

a change, however, is not clear. The problem of deciding whether the jury acted reasonably is replaced by the problem of deciding whether the court correctly applied the law. Moreover, since the actual analysis of proximate cause has not changed, all the objections to the traditional approach remain.

A third solution, one arguably more in line with the intent of *House v. Kellerman*, is a complete reconsideration both of the roles of judge and jury in negligence cases and of the whole analysis of negligence law. Such a reanalysis has been suggested for almost 50 years by Leon Green. Green's approach ignores proximate cause altogether.[99]

> The major defect in present practice is that judges do not recognize what a narrow problem causal relation is, and in almost every case submit some other problem which should not be submitted to a jury at all, or submit the negligence issue a second time, under a supposedly "*proximate cause*" formula. The latter formula is in reality nothing more than the negligence formula stated a little differently.[100]

In this analysis, the judge has three functions. He must decide: (1) Whether the interest of the injured party falls within the scope of protection offered by a duty of the injuring party; (2) whether there is an issue at all for the jury; and (3) whether the harm caused could have been reasonably anticipated by a person of ordinary prudence.[101] The jury, on the other hand, must decide: (1) Whether the injuring party's conduct caused the injury and (2) whether the injuring party was negligent.[102] The ideas embodied in the concept of "proximate cause," therefore, are split between judge and jury with the

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protected by the seventh amendment. Arkwright Mut. Ins. Co. v. Philadephia Elec. Co., 427 F.2d 1273, 1275 (3d Cir. 1970). Although Kentucky's Constitution does not specifically protect a law-fact distinction, section 7 does protect "[t]he ancient mode of trial by jury." This has been interpreted to mean that negligence requires a jury determination. Chesapeake & O. Ry. Co. v. Davis, 60 S.W. 14, *modifying* 58 S.W. 698 (Ky. 1900). Whether the "ancient mode" includes the question of proximate cause has not been raised. Arguably proximate cause has been a question of fact for so long that it is constitutionally protected. *See* Sower, *supra* note 50.

[99] Green's analysis of negligence has changed little through the years. In outlining it I will draw not only from RATIONALE OF PROXIMATE CAUSE (1927) but also from the other books and articles in which he expanded his thesis.

[100] L. GREEN, JUDGE AND JURY 195 (1930).

[101] L. GREEN, *supra* note 99, at 66-67.

[102] *Id.* at 72-77.

judge deciding if the duty of the defendant extended to the injury of the plaintiff, the jury deciding whether there was cause-in-fact (the problem of actual causation), and both wrestling with the question of foreseeability, the judge from the point of view of duty, the jury in considering the question of negligence.

Green rejects one of the controlling assumptions of proximate cause, that there is only one cause which is the legal cause of a result. "Since there are *other* causes in every case that also contributed to the victim's hurt, to seek to find whether defendant's conduct was *the* cause is literal nonsense, and equally so is the attempt to find whether the 'probabilities' are that it was *the* cause."[103] The jury should be instructed instead that if the cause was a "substantial factor" of the injury it shall find for the plaintiff.[104]

Naturally Green's approach has its critics. One of their most frequent objections is that his analysis is too uncertain[105] since the jury is given no help in deciding what a substantial factor might be. Green's answer is that by making instructions more specific, the court is able to give special weight to the evidence of one side, in effect commenting on the evidence, a practice contrary to the law in most jurisdictions.[106] More important, however, is his belief that the substantial factor test is sufficient and that "nothing can be added by way of legal rules without materially subtracting from its force . . . and

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[103] Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 557-58 (1962). The similarity of this language with that of Justice Palmore at the beginning of House v. Kellerman, 519 S.W.2d 380 (Ky. 1974) is striking: " . . . there can never be only one 'cause' of any result. Every cause is a collection of many factors, some identifiable and others not . . . ." *Id.* at 382.

[104] Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 554 (1962). The substantial factor test of causation was first suggested by Jeremiah Smith in *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1912). It has become very popular as a test through the efforts of Green and RESTATEMENT (SECOND) OF TORTS § 431. For a good discussion and a list of jurisdictions which have adopted the test, see Annot., 100 A.L.R.2d 942, 986 *et seq.* (1961). Kentucky adopted this test for proximate cause in Claycomb v. Howard, 493 S.W.2d 714, 718 (Ky. 1973), although somewhat indirectly. For proof of the Court's intent see 2 O. STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY § 592 (Supp. 1973-74).

[105] HART & HONORE, *supra* note 2 at 264.

[106] Green, *The Thrust of Tort Law Part II: Judicial Law Making*, 64 W. VA. L. REV. 115, 135 (1962). For the suggestion that the judge should comment more, not less, see Wright, *Adequacy of Instruction to the Jury*, 53 MICH. L. REV. 505, 813 (1955).

without blurring its pointed simplicity."[107]

A second criticism of Green's analysis is that because of its uncertainty it gives far too much discretionary power to the appellate judge[108] and that it is therefore more of an analysis of how judges decide cases than how cases should be decided.[109] If this were so, it would be a serious fault, since there is nothing particularly useful legally in facile explanations of how judges make their decisions.[110] It has been suggested in Green's defense, however, that his analysis reflects a pragmatic approach to the law of negligence, an approach which recognizes that society itself limits the scope of judicial discretion.[111] If this is so, Green's analysis is less a description of what judges do than a defense, founded in the belief that judge and jury must be given wide discretion if they are to fulfill their proper roles.[112]

Green's approach to negligence has been widely debated and has undoubtedly contributed to a recent trend toward an increased consideration of duty and the adoption of the substantial factor test of cause-in-fact.[113] In addition, at least one state has adopted the analysis in toto. In a concurring opinion to *Dewey v. A.F. Klaveness & Co.*,[114] a minority of the Supreme Court of Oregon indicated its willingness to accept the Green approach.[115] That minority has since become a majority, and a line of cases[116] has conclusively established that the Green anal-

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[107] GREEN, *supra* note 99, at 184.

[108] HART & HONORE, *supra* note 2 at 268.

[109] For a better example of this approach see McDonald, *Proximate Cause in Louisiana*, 16 LA. L. REV. 391 (1956).

[110] *Id.* for such facile explanations.

[111] Probert, *supra* note 2 at 394.

[112] Green, *Foreseeability in Negligence Law*, 61 COL. L.REV. 1401, 1417-20 (1961).

[113] Annot., 100 A.L.R. 2d 942 (1961).

[114] 379 P.2d 560 (Ore. 1963), *noted in* Note and Comment, *Torts-Causation, Duty, and Negligence—Some Recent Developments in Oregon Law*, 45 ORE. L. REV. 124 (1966).

[115] Three of the justices voted to continue the traditional approach, two to abandon it in favor of Green's approach, one indicated a willingness to be persuaded, and one dissented.

[116] Mayor v. Dorsett, 400 P.2d 234 (Ore. 1965); Stewart v. Nofziger Seed Co., 400 P.2d 527 (Ore. 1965); Hills v. McGillvrey, 402 P.2d 722 (Ore. 1965); Mezyk v. National Repossessions, Inc., 405 P.2d 840 (Ore. 1965); Babler Bros., Inc. v. Pacific Intermountain Express Co., 415 P.2d 735 (Ore. 1966); Stewart v. Jefferson Plywood Co., 469 P.2d 783 (Ore. 1970); Kuhns v. Standard Oil Co. of Calif., 478 P.2d 396 (Ore. 1970); Getchell v. Mansfield, 489 P.2d 953 (Ore. 1971); Jones v. Mitchell Bros. Truck Lines, 511 P.2d 347 (Ore. 1973); Allen v. Shiroma, 514 P.2d 545 (Ore. 1973); Parsyck v. Abbott, 516 P.2d 78 (Ore. 1973); McEwen v. Ortho Pharmaceutical Corp. 528 P.2d 522 (Ore. 1974).

ysis is the preferred one in Oregon.[117] This adoption has had no impact outside of Oregon, however, and the enthusiasm with which it was greeted[118] has thus far been unrewarded.

To those who understand both approaches to the problem of causation, the difference between the two is slight.[119] Similar objections are raised to both, that they are uncertain and that they give the judge too much discretion. Unfortunately there are few who can honestly say they understand either method fully, and those who do seldom sit on juries. Green's analysis has the advantage of clarifying somewhat the responsibilties of both judge and jury. If it is uncertain, the uncertainty is based on a belief that the role of both judge and jury is best expressed in a grant of broad discretion.

V. CONCLUSION: *House v. Kellerman* AND KENTUCKY NEGLIGENCE LAW

The holding that superseding cause is a question of law in *House v. Kellerman* is important but narrow. The implications of the case are much broader, however. The case is a clear indication, for example, that the Court will consider challenges to previously acceptable instructions if the instruction can be shown to be too complex or give undue emphasis to one party's evidence.

The most important implications of the case relate to Kentucky negligence law. Although it is impossible to be certain, it may be that the court's adoption of the substantial factor test in 1973,[120] coupled with Justice Palmore's statement about cause[121] in *House v. Kellerman*, echoing Green,[122] indicate a willingness to follow Oregon in adopting Green's analysis.[123] It

[117] The court has been unwilling to reverse an instruction on proximate cause, however, holding it harmless error. *See* Eliason v. United Amusement Co., 504 P.2d 94 (Ore. 1972).

[118] *See* Probert, *supra* note 2, at 389.

[119] *Id.* at 387.

[120] *See* Claycomb v. Howard, 493 S.W.2d 714 (Ky. 1973). *See also* O. STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY § 592 (1973-74 Supp.): "[T]he Court of Appeals indicated its preference for the 'substantial factor' phraseology of Restatement, Torts 2d § 231, in lieu of 'proximate cause.'"

[121] 519 S.W.2d 380, 382 (Ky. 1974).

[122] *See* note 103 and accompanying text.

[123] It is clear that the Court still considers cause to be central to the theory of negligence. "[W]hen it is considered that mere culpability has no relationship to a

is equally possible that the Court may make the whole question of proximate cause and cause-in-fact a question of law.[124] In either event it is obvious that *House v. Kellerman* is a milestone of sorts in Kentucky negligence law although the road that law is on is uncertain. As it stands now, the changes it has made are only procedural; the court will decide a question previously decided by the jury. The groundwork has been laid, however, for a substantive change of the first magnitude. Whether the Court will build a new structure of negligence law on that groundwork, only time will tell. Until that decision is made, the Kentucky Bar would be well advised to consider such a possibility and to frame its negligence cases with that possibility in mind.

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tort except insofar as it is a *cause* of the injury, the only logical basis for an apportionment is *causation* rather than *degree of negligence*." Cox v. Cooper, 510 S.W.2d 530, 536, n.3 (Ky. 1974). Whether this is cause-in-fact or proximate cause is less clear.

[124] The language of note 2, 519 S.W.2d 380, 382 (Ky. 1974), indicates this result if taken literally. Such a move would be genuinely unprecedented and probably unwise. It would clearly be open to the constitutional challenge discussed *supra* at note 98.