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Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation Riddles

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CAUSATION REQUIREMENTS IN TORT AND INSURANCE LAW PRACTICE: DEMYSTIFYING SOME LEGAL CAUSATION "RIDDLES"

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I. INTRODUCTION

Legal causation requirements, in both tort and insurance law, rank among the most pervasive yet most elusive and most misunderstood of all legal concepts in Anglo-American law for legal practitioners,[1] the courts,[2] and academic scholars[3] alike. Indeed, no less an authority than William Lloyd Prosser has stated that there "is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion" than proximate cause issues, "despite the manifold attempts which have been made to clarify the subject."[4]

Although some commentators have looked upon legal causation's "mystifying riddles" as the "last refuge of muddy thinkers,"[5] the purpose of this article is to attempt to demystify many of these proximate cause riddles in

1. *See, e.g.*, Peter C. Haley, *Paradigms of Proximate Cause*, 36 TORT & INS. L.J. 147 (2000); Mark D. Wurefel & Mark Koop, *"Efficient Proximate Causation" in the Context of Property Insurance Claims*, 65 DEFENSE COUNSEL J. 400 (1998); William C. Brewer Jr., *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141 (1961).

2. *See, e.g.*, Huffman v. Soreson, 76 S.E.2d 183, 186 (Va. 1953) ("Proximate cause is a concept difficult to define and almost impossible to explain."); White v. S. Ry., 144 S.E. 424, 429 (Va. 1928) ("Proximate cause is deep and muddy water into which many men, wise and otherwise, have ventured.").

3. *See, e.g.*, Richard Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Patrick J. Kelly, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49 (1991); Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569 (1987–88); Peter N. Swisher, *Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, 2 NEV. L.J. 351 (2002).

4. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 263 (5th ed. 1984); *see also* William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369 (1950); Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761 (1951); Roscoe Pound, *Causation*, 67 YALE L.J. 1 (1967); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962). *And see* LEON GREEN, THE RATIONALE OF PROXIMATE CAUSE (1927); H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW OF TORTS (2d ed. 1985).

5. *See, e.g.*, Kenneth Vinson, *Proximate Cause Should Be Barred from Wandering Outside Negligence Law*, 13 FLA. ST. U. L. REV. 215 (1985) ("In tort law's darkest corners lurks the concept of proximate cause.... When lawyers and judges toss causation rhetoric into briefs and opinions, the resulting babble smothers common sense and further corrupts legal English.")

tort actions and insurance coverage disputes and hopefully provide both the tort law practitioner and the insurance law practitioner with some general guidelines and some practical tips for negotiating this often treacherous legal terrain while pleading and proving legal causation requirements.

II. CAUSATION REQUIREMENTS IN TORT LAW PRACTICE

Although causation requirements play an important role in pleading and proving intentional torts[6] and strict liability tort actions,[7] negligence cases still represent the vast majority of tort actions alleged, presented, settled, or tried in American courts today. The concept of negligence and the legal rules associated with negligence therefore dominate the law of torts.[8]

It is basic hornbook law that in order to successfully bring a tort action in negligence, the plaintiff must plead and prove, by a preponderance of the evidence, all four prima facie elements of a negligence cause of action: (1) that the defendant owed the plaintiff a duty to use reasonable and ordinary care toward the plaintiff and protect the plaintiff against unreasonable risks, (2) that the defendant breached this duty to the plaintiff by his or her unreasonable conduct, (3) that the defendant's unreasonable conduct was the cause-in-fact and the proximate cause of the harm suffered by the plaintiff, and (4) that the plaintiff suffered actual harm or damages to the plaintiff's person or property.[9]

It is not enough, therefore, that the plaintiff's attorney can plead and prove that the defendant had, and breached, a reasonable duty of care to the plaintiff and that the plaintiff suffered personal injury or property damages; the plaintiff's attorney must also plead and prove that the defendant's negligent actions constituted the cause-in-fact and the proximate cause of the plaintiff's injuries.[10]

6. For intentional torts, there is a definite tendency for courts to impose greater responsibility upon a defendant whose conduct was intended to do harm, and more liberal rules are applied to the consequences for which the defendant will be held liable, the proof required, and damages recovery permitted. Consequently, for intentional torts, remote causation often is enough to create liability. *See, e.g.*, KEETON ET AL., *supra* note 4, at 37 (citing the often-quoted case of Derosier v. New Eng. Tel. & Tel. Co., 130 A. 145, 152 (N.H. 1925)) ("For an intended injury, the law is astute to discover even very remote causation.").

7. In products liability actions, including defective warning cases, the plaintiff still has the burden of pleading and proving that the product defect was the cause-in-fact and the proximate cause of the harm claimed by the plaintiff. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS 1016–18 (2000).

8. *See generally* KEETON ET AL., *supra* note 4, at 160–73; DOBBS, *supra* note 7, at 257–73.

9. *See generally* KEETON ET AL., *supra* note 4, at 164–68; DOBBS, *supra* note 7, at 269–73.

10. *See generally* RESTATEMENT (SECOND) OF TORTS § 430 (1965) ("In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm.")

A. *Causation-in-Fact or "but for" Causation*

In the great number of negligence cases, courts generally apply a "but for" test to determine whether the defendant's conduct was the cause-in-fact of the plaintiff's harm, based upon a causal chain of events without any intervening, superseding causes.[11] However, there must be a direct causal connection between the defendant's negligent conduct and the plaintiff's injury rather than an indirect or remote causal connection; and, consequently, a major problem with causation-in-fact, standing alone, is the problem of unlimited causal liability based on remote causation. According to Professor Charles Carpenter, this cause-in-fact test, standing alone, "would impose liability for acts very remote in time and space, and where the defendant's act was a most insignificant and incidental factor. It would frequently require the imposition of liability in cases where it would be absurd to do so."[12]

1. Multiple Concurrent Causation and the Substantial Factor Rule

Another important legal concept involving causation-in-fact, as a variation to the "but for" causation rule, involves multiple concurrent causation and the "substantial factor" rule. The substantial factor rule may be briefly summarized as follows: If two, or more, causes concur to bring about an event and either one of them, operating alone, would have been sufficient to cause the identical result, then each cause-in-fact has played so important a part in producing the result that legal responsibility should be imposed upon it as a substantial factor of the ultimate result.[13] There may be more than one substantial factor in a causal chain of events.

Case law in a majority of states today broadly recognizes this substantial factor concept for causation-in-fact,[14] and it has likewise been incorporated

11. *See generally* Wex Malone, *Ruminations in Cause-in-Fact*, 9 STAN. L. REV. 60 (1956); Wright, *supra* note 3.

12. Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CAL. L. REV. 229, 235 (1932).

13. This substantial factor concept was first introduced by Professor Jeremiah Smith in *Legal Causes of Action in Torts*, 25 HARV. L. REV. 101, 223, 229 (1911), and was adopted in the seminal case of *Anderson v. Minneapolis, St. Paul & Sault Sainte Marie Ry. Co.*, 179 N.W. 45 (Minn. 1920). *See generally* KEETON ET AL., *supra* note 4, at 265–68; 3 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS 384–87 (1986).

14. *See, e.g.*, Bockrath v. Aldrich Chem. Co., 86 Cal. Rptr. 2d 846 (Cal. 1999) (holding that the substantial factor test for proving causation-in-fact is a relatively broad one, requiring only that the contribution of individual causes be more than negligible or theoretical; thus, a causal force that plays only an infinitesimal or theoretical part in bringing about an injury or loss is not a substantial factor); *see also* Sharp v. Fairbanks N. Star Borough, 569 P.2d 178, 181 (Alaska 1977); Ekberg v. Greene, 588 P.2d 375, 377 (Colo. 1979); Flom v. Flom, 291 N.W.2d 914, 917 (Minn. 1980); Clark v. Leisure Vehicles Inc., 292 N.W.2d 630, 632 (Wis. 1980) (similar holdings).

into the *Restatement (Second) of Torts*.[15] So although the substantial factor rule may not be completely synonymous with the "but for" rule, many courts in practice usually lump these two rules together in determining causation-in-fact issues.[16]

2. Identifying the Defendant Who Caused the Plaintiff's Injuries

The plaintiff's attorney generally has the burden of proof to show, through direct evidence[17] or circumstantial evidence,[18] that the defendant was the cause-in-fact of the plaintiff's injuries. Moreover, the defendant's negligence must have been the probable cause, rather than merely a possible cause, of the plaintiff's injuries.[19]

Under the doctrine of res ipsa loquitur,[20] a plaintiff's attorney may also ask the jury to infer negligence on the part of the defendant in the absence of any direct or circumstantial evidence and in the absence of any proof of negligence whatever.[21] However, although the plaintiff generally has the burden of proving by a preponderance of the evidence that the defendant's

15. *Restatement (Second) of Torts* § 431 states that an actor's negligent conduct is a legal cause of harm to another if his or her conduct is a substantial factor in bringing about the harm. *See also* Thacker v. UNR Indus. Inc., 603 N.E.2d 449 (Ill. 1992) (holding that under the substantial factor test of the *Restatement (Second) of Torts* § 431, the defendant's conduct is said to be the cause-in-fact of the event if it was a material element and a substantial factor in bringing the event about; in other words, the test requires the alleged tortfeasor's conduct to be somehow "responsible" for producing the injury at issue).

16. *See, e.g.*, *Sharp*, 569 P.2d at 180 (Normally, in order to satisfy the substantial factor test, it must be shown both that the accident would not have happened "but for" the defendant's negligence and that the negligent act was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to it.).

17. There is no need to draw any inferences from direct evidence because the only issues are the credibility and reliability of eyewitnesses. For example, if P is suing D for her personal injuries, claiming that D was negligently speeding in his automobile, X's eyewitness testimony that she observed D driving very fast is a form of direct evidence; and the impact of this direct evidence will largely depend on the jury's determination of X's credibility, based upon X's demeanor in court, and other relevant factors. *See, e.g.*, JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 80 (2nd ed. 2000).

18. Circumstantial evidence is the most common form of evidence utilized by the plaintiff's attorney to prove that the defendant acted negligently, and drawing inference of fact from circumstantial evidence is largely a matter of assessing probabilities rather than possibilities of negligence. *See, e.g.*, DOBBS, *supra* note 7, at 361–65.

19. *See, e.g.*, S. States Coop. v. Doggett, 292 S.E.2d 331, 335 (Va. 1982); *see also* Daubert v. Merrell Dow Pharms. 43 F.3d 1311 (9th Cir. 1995) (applying California law) (holding that plaintiffs had the burden of proving an epidemiological causal risk factor of at least 2.0 or higher in mothers who took Bendectin, a drug prescribed for morning sickness).

20. ("The thing speaks for itself.") But as some critics have asked, "Res ipsa loquitur, sed quid in infernos dicet?" ("The thing speaks for itself, but what the hell does it say?")

21. *See, e.g.*, Charles E. Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519 (1934); Malone, *Res Ipsa Loquitur and Proof by Inference*, 4 LA. L. REV. 70 (1941); McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55 (1951). *See generally* KEETON ET AL., *supra* note 4, at 242–51; DOBBS, *supra* note 7, at 370–89.

acts or omissions were the actual and proximate cause of the plaintiff's injuries, there are rare instances when the courts will shift this burden of proof by requiring the defendants to prove that they were not the actual cause-in-fact of the plaintiff's injuries.

a. Summers v. Tice: *The Alternative Liability Theory*—In the case of *Summers v. Tice*,[22] plaintiff, who was injured in a hunting accident, could not prove which of two other hunters shooting in his direction had actually fired the shotgun pellet that wounded plaintiff in the eye. Under a traditional "but for" causation analysis, plaintiff would be unable to prove more likely than not that either one of defendants was the probable cause of his injury. However, neither defendant was innocent, both having breached a reasonable duty of care to plaintiff by firing in his direction, and the cause of the injury was necessarily the result of one of them. In order to solve this dilemma, the *Summers v. Tice* court shifted the burden of proof to require that defendants prove that they were not the cause of plaintiff's injury; and if defendants were unable to exculpate themselves, then both defendants would be found liable as joint tortfeasors.[23]

This "alternative liability" theory of *Summers v. Tice* has been recognized by a number of other courts[24] and has also been adopted into the *Restatement (Second) of Torts* § 433B, providing that (1) where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seek to limit their liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor;[25] and (2) where the conduct of two or more actors is tortious and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.[26] Other than these particular exceptions to the general rule, however, the burden of proof that the tortious conduct of the defendant has caused harm to the plaintiff is still upon the plaintiff.[27]

22. Summers v. Tice, 199 P.2d 1 (Cal. 1948).

23. *Id.*

24. *See, e.g.*, Wysocki v. Reed, 583 N.E.2d 1139 (Ill. App. Ct. 1991) (involving two manufacturers of an allegedly defective drug); Minnich v. Ashland Oil Co. Inc., 473 N.E.2d 1199 (Ohio 1984) (two suppliers of an explosive compound); Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich. 1984) (a DES case with all possible defendants joined in the action); McMillan v. Mahoney, 393 S.E.2d 298 (N.C. 1990) (two boys firing air rifles). *But see contra* Senn v. Merrell-Dow Pharms., Inc. 751 P.2d 215 (Or. 1998) (rejecting this alternative causation theory in a pharmaceutical vaccine case).

25. RESTATEMENT (SECOND) OF TORTS § 433B (2).

26. *Id.* § 433B (3).

27. *Id.* § 433B (1).

b. Market Share and Enterprise Liability Theories—In the case of *Sindell v. Abbott Laboratories*,[28] the California Supreme Court held that plaintiff, who could not prove which of 200 different companies produced the diethylstilbestrol (DES) that allegedly caused her injuries, need only join a substantial market share percentage of the manufacturers of the DES drug, and the burden of proof of causation would then shift to defendants to apportion damages according to their market share of the DES drug.[29]

A number of other courts, however, have rejected this theory of "market share liability" absent any state legislation adopting such a theory of recovery,[30] and still other courts have limited market share liability only to DES cases, which involved identical products that were manufactured by 200 companies, in contrast to asbestos products and other marketed products that were not identically manufactured.[31]

Other courts have adopted the concept of "enterprise liability," or industrywide liability. For example, in the case of *Hall v. DuPont*,[32] thirteen minor plaintiffs were injured in separate explosions caused by allegedly defective blasting caps. Defendants were the American blasting cap trade association and six blasting cap manufacturers that accounted for nearly all of the U.S. blasting cap industry, and each defendant had manufactured its blasting caps in adherence to industrywide standards. The court held that under these circumstances, the burden of proof on the issue of causation would shift from plaintiffs, who had no way of identifying which defendants made which blasting caps, to defendants.[33] However, the concept of enterprise liability, as well as market share liability, to date has not gained wide acceptance in many courts.[34]

B. *Proximate (or Legal) Causation*

Because "but for" causation-in-fact, standing alone, will often impose liability for extremely remote and insignificant causes,[35] tort practitioners

28. Sindell v. Abbott Labs., 163 Cal. Rptr. 132 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

29. *See also* Hymowitz v. Eli Lilly Co., 541 N.Y.S.2d 941 (N.Y.), *cert. denied*, 493 U.S. 994 (1989); McCormick v. Abbott Labs., 617 F. Supp. 1521 (D. Mass. 1985) (also adopting market share liability for DES manufacturers).

30. *See, e.g.*, Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986); Zaft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984).

31. *See, e.g.*, Goldman v. Johns Manville Corp., 514 N.E.2d 691 (Ohio 1987) (asbestos); Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985) (asbestos); Lee v. Baxter Healthcare Corp., 721 F. Supp. 89 (D. Md. 1989), *aff'd*, 898 F.2d 146 (4th Cir. 1990) (breast implants).

32. Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).

33. *Id.*

34. *See, e.g.*, Santiago v. Sherwin-Williams Co., 794 F. Supp. 29 (D. Mass. 1992), *aff'd*, 3 F.3d 546 (1st Cir. 1993); Cimino v. Raymark Indus., 151 F.3d 297 (5th Cir. 1998) (applying Texas law) (expressly rejecting these theories of causal liability).

35. *See* Carpenter, *supra* note 12, and accompanying text.

must also plead and prove that the defendant's negligent conduct was the proximate (or legal) cause of the plaintiff's damages.[36] And over the past four centuries, from the time of Lord Chancellor Francis Bacon's first maxim of the law, *In jure non remota causa, sed proxima, spectatur*,[37] courts and commentators have been struggling mightily to properly understand, and to correctly apply, the concept of proximate causation to present-day negligence actions.[38]

In practice, however, most courts have long implicitly understood, and most tort practitioners have long suspected, that the concept of proximate cause is very different from the concept of cause-in-fact[39] and has very little to do with causation principles per se. Rather, according to prevailing contemporary American tort law theory and practice, proximate cause can best be understood as a limitation to tort liability primarily based upon public policy grounds, rather than based upon underlying causation principles.

1. Proximate Cause as a Limitation to Liability Based upon Public Policy Grounds

It may seem strange that after centuries of trying to understand and systematically apply historically based proximate cause concepts to negligence actions, the majority of contemporary courts and commentators today have basically discarded a causally connected definition of *proximate cause* and instead have adopted a public policy definition.

According to Professor Prosser,

> Proximate cause—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct.... As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result

36. *See, e.g.*, James Jr. & Perry, *supra* note 4, at 761 (noting that a legal causation test includes a requirement that the wrongful conduct must be a *cause in fact* of the harm, but if this stood alone, the scope of liability would be vast indeed.... But the law has not stopped there—it has developed further restrictions and limitations. The concept this development has produced is generally called "proximate" or "legal" cause.).

37. (In law not the remote cause, but the proximate cause, it looked to.) Lord Chancellor Francis Bacon, *Maxims of the Law* (1630), *reprinted in* 7 JAMES SPEDDING ET AL., THE WORKS OF FRANCIS BACON 327 (1870).

38. *See, e.g.*, Kelly, *supra* note 3, at 105 ("And so we go round and round, locked in a relentless rivalry between the normative and descriptive poles of a single fallacious theory in which the real proximate cause question cannot be asked."); Etheridge v. S.R.R., 129 S.E. 680, 683 (Va. 1925) (concluding that legal causation "has not only troubled the unlearned, but has vexed the erudite"; nevertheless, "it has grown to be a part of the livery of the law of negligence, and it is too late to discard it"); *see also supra* notes 1–5 and authority cited therein.

39. *See, e.g.*, Snyder v. LTG Luftechnische GmbH, 955 S.W.2d 252, 256 n.6 (Tenn. 1997) ("The distinction between cause in fact and proximate, or legal, cause is not merely an exercise in semantics. The terms are not interchangeable. Although both cause in fact and proximate, or legal, cause are elements of negligence that the plaintiff must prove, they are very different concepts.")

> and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.[40]

Professor Dobbs also agrees that "[t]he proximate cause issue, in spite of the terminology, is not about causation at all, but about the appropriate scope of responsibility."[41] And, as the Tennessee Supreme Court recently stated,

> [p]roximate or legal cause is a policy decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, [and] precedent, and "our more or less inadequately expressed ideas of what justice demands or what is administratively possible and convenient."[42]

For example, in the case of *Enright v. Eli Lilly Co.*,[43] the New York Court of Appeals held, for public policy reasons under a proximate cause rationale, that recovery to people who were injured by the miscarriage preventative drug DES would be limited only to mothers and their children who were injured by in utero exposure to DES even though "the rippling effects of DES exposure may extend to generations," because "it is our duty to confine liability within manageable limits."[44]

Thus, it would seem appropriate for a plaintiff's attorney to argue that such proximate cause principles ought to include the factual events surrounding his or her particular case—and for a defense attorney to argue that proximate cause principles ought to limit such liability—based upon underlying public policy arguments, as well as based upon more traditional historically centered causation arguments.[45]

2. Proximate Cause Based upon Concepts of Foreseeability

The rationale for proximate cause's limitation to liability based on underlying public policy reasons, however, was not created in a vacuum; and most courts today in determining whether a defendant's act, or omission to act, was too remote or did in fact constitute the proximate cause of a plaintiff's injuries still justify their decisions based upon concepts of foreseeability.

40. KEETON ET AL., *supra* note 4, at 264.

41. DOBBS, *supra* note 7, at 443.

42. *Snyder*, 955 S.W.2d at 256 n.6 (citing as authority Bain v. Wells, 936 S.W.2d 618, 625 (Tenn. 1997)); George v. Alexander, 931 S.W.2d 517, 521 (Tenn. 1996).

43. Enright v. Eli Lilly Co., 568 N.Y.S.2d 550 (N.Y. 1991)

44. *Id.* at 558; *see also* Grover v. Eli Lilly & Co., 591 N.E.2d 696 (Ohio 1992) (similar holding).

45. For example, a plaintiff or defense attorney might want to justify their public policy proximate cause argument based upon a "law and economics" underlying rationale (or not). *See, e.g.*, William Landes & Richard Posner, *Causation in Tort Law: An Economics Approach*, 12 J. LEGAL STUDIES 109 (1983); Mark Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363 (1984).

This proximate cause requirement of foreseeability, as discussed in more detail below, includes (1) the foreseeability of the plaintiff or a rescuer, (2) the foreseeability of harm in a direct causal chain of events, (3) the foreseeability or unforeseeability of intervening causes, and (4) the foreseeability of the extent of harm.

a. The Foreseeable Plaintiff and the Foreseeable Rescuer—In *Palsgraf v. Long Island Railroad Co.*,[46] arguably the most celebrated (or, some would argue, the most notorious) tort case in American jurisprudence, the New York Court of Appeals arrived at conflicting conclusions as to whether proximate causation should be characterized in terms of a duty to an unforeseeable plaintiff or whether proximate causation should more properly be based upon foreseeable or unforeseeable causal consequences.

The facts of this case were that a passenger was running to catch one of defendant's trains at a railroad station. Defendant's guards, attempting to assist the passenger in boarding the train, negligently dislodged a package from the passenger's arms, causing it to fall on the rails. The package contained fireworks, which exploded with some violence. This concussion allegedly overturned some scales "many feet" from where the package fell, which in turn injured Mrs. Palsgraf, another railroad passenger who was waiting on the station platform for another train to depart.[47] In a four-to-three decision written by Chief Justice Benjamin Cardozo speaking for the majority, the court defined proximate cause in terms of a duty to plaintiff, and no duty would be owed to an unforeseeable plaintiff such as Mrs. Palsgraf, who was not in a foreseeable "zone of danger."

The first *Restatement of Torts* (to which Judge Cardozo conveniently served as an advisor) almost immediately accepted Cardozo's view that there is no duty, and hence there is no negligence and no tort liability, to an unforeseeable plaintiff who is not within a "foreseeable zone of danger."[48] A number of courts today still recognize this underlying rationale for Judge Cardozo's decision in *Palsgraf*.[49]

46. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

47. A study of the record, however, indicates that this event could not possibly have happened in this way. Ordinary fireworks were involved here, not a bomb; and plaintiff's original complaint, before it was amended, alleged that the scale was knocked over by a stampede of frightened passengers rather than by the concussion. Also, plaintiff's attorney, in a motion for reargument, pointed out that Mrs. Palsgraf stood much closer to the scene of the fireworks explosion than the majority opinion in *Palsgraf* suggested. *See generally* William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); W.H. Manz, *Palsgraf: Cardozo's Urban Legend?*, 107 DICK. L. REV. 785 (2003).

48. RESTATEMENT OF TORTS § 281 cmt. c; *see also* KEETON ET AL., *supra* note 4, at 285.

49. *See, e.g.*, Busta v. Columbus Hosp. Corp., 916 P.2d 122 (Mont. 1996); Edwards v. Honeywell Inc., 50 F.3d 484 (7th Cir. 1995) (applying Indiana law); Radigan v. W.J. Halloran Co., 196 A.2d 160 (R.I. 1963); Tucker v. Collar, 285 P.2d 178 (Ariz. 1955).

Three judges, however, dissented in *Palsgraf* in an equally persuasive opinion written by Judge Andrews. Judge Andrews voiced the more traditional view that *proximate causation* "is a term of convenience, of public policy, of a rough sense of justice" and not only "is he wronged to whom harm might reasonably be expected to result, but he is also [harmed] who is in fact injured even if he be outside what would generally be thought the danger zone."[50] Andrews therefore characterized proximate cause more in terms of foreseeability of harm and causation rather than as a duty to plaintiff. And, not surprisingly, the first *Restatement of Torts* also adopted Judge Andrews's rationale of proximate causation.[51] Andrews's *Palsgraf* dissenting opinion has been followed in other states as well.[52]

Which is the better-reasoned approach? A number of other influential proximate cause decisions, including the so-called British Boat Cases of *In re Polemis*[53] and the *Wagon Mound* cases,[54] appear to follow Judge Andrews's direct versus indirect causal chain of events rationale for proximate cause, rather than applying Cardozo's duty-relation-risk formula. And various law school commentators also have criticized Cardozo's duty-relation-risk approach in *Palsgraf*.[55]

However, in retrospect, Cardozo and Andrews both attempted to limit tort liability using a proximate cause rationale, within their "rough sense of justice," whenever public policy considerations made such a limitation to

50. 162 N.E. 99 at 103.

51. RESTATEMENT OF TORTS § 433 cmt. e; *see also* RESTATEMENT (SECOND) OF TORTS § 435.

52. *See, e.g.*, Stephenson v. Universal Metrics Inc., 641 N.W.2d 158 (Wis. 2002); Jackson v. Lowenstein & Bros., 136 S.W.2d 495 (Tenn. 1940).

53. *See In re* Polemis, [1921] 3 K.B. 560 (A.C. 1921) (involving defendant's workman who negligently allowed a plank to drop into the hold of a ship where a resulting spark ignited gasoline vapors in the hold; the court applied a direct causation chain of events rationale for proximate cause even though the ultimate result might not have been foreseeable).

54. *See, e.g.*, Wagon Mound #1, [1961] A.C. 388 (P.C. 1961) (involving the negligent leak of furnace oil from a ship that caught fire in Sydney Harbor, Australia; the court held that a direct causal chain of events, as required in *Polemis*, must also have foreseeable consequences); Wagon Mound #2, [1967] 1 A.C. 617 (P.C. 1967) (holding that defendant's ship engineer reasonably should have foreseen the resulting harm from the leaking furnace oil on the water); *see also In re* Kinsman Transit Co., 338 F.2d 708 (2nd Cir. 1964) (following the *Wagon Mound* rationale by requiring foreseeable harm from a direct causal chain of events for proximate cause).

55. *See* Jerry L. Phillips, *Law School Teaching*, 45 ST. LOUIS U. L.J. 725, 727 (2001):

> Why does Cardozo confuse generations of law students [and practitioners and judges] by talking about duty instead of foreseeability? Is it because New York [tort law] was stuck with the direct-cause rule of proximate causation, and he wanted to avoid applying the rule? Then why not change the rule from direct cause (*Polemis*) to foreseeability (*Wagon Mound*) instead of talking about duty? Of course, Cardozo was not the first to confuse duty with proximate cause.

Id.

tort liability appropriate under the circumstances. Accordingly, when the situation warrants, courts have applied either or both of these proximate cause doctrines.[56]

In another classic tort case, *Wagner v. International Railway*,[57] Judge Cardozo held that because "danger invites rescue," the rescuer was a foreseeable plaintiff within the scope of a foreseeable risk of loss. Unfortunately, Cardozo did not make it clear whether he regarded such liability as an exception to the *Palsgraf* rule or whether the rescuer was within a foreseeable zone of danger.[58]

Accordingly, most courts today recognize that a defendant who negligently injures another may also be liable to that person's rescuer under this danger invites rescue doctrine.[59] The courts have split, however, on whether professional rescuers, such as firefighters and police officers, may be barred from recovery under special rules applied to them.[60]

b. Foreseeable Manner of Harm in a Direct Causal Chain of Events—When there is a sequence of events leading to the plaintiff's injury, in order to hold the defendant liable for damages, the cardinal rule of proximate causation in tort law is that the plaintiff's harm must have been the direct (as opposed to the indirect or remote) and foreseeable (as opposed to unforeseeable) consequence of the defendant's acts in a causal chain of events, unbroken by any intervening, superseding cause.[61] Stated another way, the proximate cause of an event "is that act or omission [of the defendant]

56. *See, e.g.*, Dahlsgtrom v. Shrum, 84 A.2d 289 (Pa. 1951); Whiteford v. Yamaha Motor Corp., 582 N.W.2d 916 (Minn. 1998); *Universal Metrics*, 641 N.W.2d at 158; *see also* DOBBS, *supra* note 7, at 457:

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

Id.

57. Wagner v. Int'l Ry., 153 N.E. 437 (N.Y. 1921).

58. *See* DOBBS, *supra* note 7, at 456.

59. *See* RESTATEMENT (SECOND) OF TORTS § 445; *see, e.g.*, Solomon v. Sheull, 457 N.W.2d 669 (Mich. 1990) (holding that rescuers as a class are foreseeable); Tri-State Wholesale Associated Growers Inc. v. Barera, 917 S.W.2d 391 (Tex. Civ. App. 1996) ("Our jurisprudence is well-settled that the acts of rescuers are generally the foreseeable results of negligent activity.")

60. *See, e.g.*, Berko v. Freda, 459 A.2d 663 (N.J. 1983); Lipson v. Superior Court, 182 Cal. Rptr. 629 (Cal. 1982); Greene v. Consol. Freightways Corp., 74 F. Supp. 2d 616 (E.D. Va. 1999); *see also* Larry D. Scheafer, Annotation, *Liability of Owner or Occupant of Premises to Fireman Coming Thereon in Discharge of His Duty*, 11 A.L.R.4th 597 (1981); Richard C. Tinney, Annotation, *Liability of Owner or Occupant of Premises to Police Officers Coming Thereon in Discharge of Officer's Duty*, 30 A.L.R.4th 81 (1981).

61. *See generally* KEETON ET AL., *supra* note 4, at 272–300; DOBBS, *supra* note 7, at 451–70.

which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred."[62] But herein lies the rub. If proximate cause normally is a question of fact to be resolved by the jury,[63] how does the trier of fact determine whether the resulting harm is foreseeable or not?

The classic *Kinsman Transit* cases,[64] arguably the American equivalent of the British *Wagon Mound* cases,[65] illustrate this foreseeability of harm conundrum in a direct causal chain of events. In these cases, employees of the Kinsman Transit Company negligently moored a ship, the *Shivas*, at a dock in the Buffalo River, three miles above a lift bridge maintained by the City of Buffalo, New York. Due to ice and debris in the river, the mooring lines pulled out from the improperly anchored mooring block. The *Shivas* broke loose and drifted downstream, colliding with another ship, the *Tewksbury*, and both ships floated down the river together toward the bridge. Frantic telephone calls to workers on the bridge to raise it in time for the two ships went unanswered because one bridge crew had gone off duty and the other bridge crew was late. The ships crashed into the center of the bridge, causing it to collapse, backing up the river, and causing extensive property damage up and down the river.

The federal district court jury found negligence and liability on the part of Kinsman and the City of Buffalo, holding that the particular events in this direct causal chain of events were foreseeable and unbroken by any unforeseeable intervening causes. The Second Circuit Court of Appeals affirmed, although Judge Friendly warned that "other American courts, purporting applying a test of foreseeability to damages, extend that concept to such unforeseeable lengths as to raise serious doubt whether the concept is meaningful: indeed we wonder whether the British courts are not finding it necessary to limit the language of the *Wagon Mound* [cases]." Most courts ultimately realize, however, "that there must be some limitation to this. Somewhere a point will be reached when courts will agree that the [causal] link has become too tenuous [and] that what is claimed to be consequence is only fortuity."[66]

62. *See, e.g.*, Atrium Unit Owners Ass'n v. King, 585 S.E.2d 545, 548 (Va. 2003).

63. *Id. But see also* RESTATEMENT (SECOND) OF TORTS § 435 (2) (holding that the court, applying its judicial discretion, may determine in retrospect that the causal chain of events was highly extraordinary and therefore unforeseeable). *See, e.g.*, infra notes 71–76 and accompanying text.

64. *In re* Kinsman Transit Co., 338 F.2d 708 (2nd Cir. 1964) (Kinsman No. 1); *In re* Kinsman Transit Co., 388 F.2d 821 (2nd Cir. 1968) (Kinsman No. 2).

65. *See supra* note 54.

66. *In re Kinsman Transit Co.*, 338 F.2d at 708, 724–25. However, in the subsequent case of *In re Kinsman Transit Co.*, 388 F.2d 821, the court held that related economic loss resulting from this causal chain of events was unforeseeable; and, therefore, there was no liability in this case for negligence based upon proximate causation principles.

Is there a viable resolution to this interpretive conundrum? A number of American courts, in determining foreseeability of harm, have made a distinction between the particular manner of harm and the general type of harm suffered by the plaintiff, as propounded by Professors Fowler Harper and Fleming James Jr. in their influential torts treatise.[67] For example, in the celebrated "flaming rat" case,[68] defendant instructed plaintiff to clean a coin-operated machine with gasoline in a small room where there was a lighted gas heater nearby with an open flame. While plaintiff was cleaning the machine with gasoline, a rat escaped from under the machine and ran to take refuge under the heater, where its fur, now impregnated with gasoline fumes, caught fire from the flame. The rat then "returned in haste" to its original hideout under the coin-operated machine, which then exploded in flames, badly injuring plaintiff.

The *Daniels* court held that although the particular manner of harm might have been unforeseeable (i.e., that a flaming rat returning to its hideout under the coin-operated machine might have ignited the gasoline under this highly unusual causal chain of events), the general type of harm was foreseeable (i.e., that the use of gasoline near an open flame may cause an explosion and fire).[69]

Another equally bizarre case involved a nude eleven-year-old boy who was riding a canister vacuum cleaner as if it were a toy car. His penis slipped through the canister casing and was amputated by the vacuum cleaner fan blades traveling at approximately 20,000 revolutions per minute. Although the particular manner of harm was unforeseeable (as almost everyone would agree), the general type of harm (the possibility of cutting off one's finger or another appendage as a result of the unprotected fan blades) was held to be foreseeable.[70]

67. *See, e.g.*, FOWLER HARPER ET AL., THE LAW OF TORTS 162–63 (2nd ed. 1986) ("Foreseeability does not mean that the precise hazard or the exact consequences that were encountered should have been foreseen.") Professors Harper and James therefore argued for a more expansive "enterprise liability" approach to proximate cause and foreseeability of harm issues in most tort law disputes:

> As the fact of insurance and loss distribution increasingly permeates our system, and the importance of individual blameworthiness wanes, the limitation (of proximate cause, or duty, etc.) may be expected to take on more and more the character of limitations measured by what is felt to be normally incidental to the kind of activity or enterprise that is footing the bill.

Id. at 131. Prosser Prosser, like Judge Friendly, was skeptical of Harper and James's more expansive approach to proximate cause and foreseeability of harm issues. "Harper and James' torts treatise is very impressive and comprehensive," Professor Prosser told my first-year torts class in 1971, "but it can be summarized in one sentence: The plaintiff always wins."

68. United Novelty Co. v. Daniels, 42 So. 2d 395 (Miss. 1949).

69. *Id.; see also* Derdiarian v. Felix Contracting Co., 434 N.Y.S.2d 166 (N.Y. 1980) (similar holding involving a plaintiff who burst into flames as a result of another highly unusual causal chain of events).

70. *See* LaRue v. Nat'l Elec. Corp., 571 F.2d 51 (1st Cir. 1978) (applying Massachusetts law).

This important interpretive rule involving foreseeability of harm has also been codified in the *Restatement (Second) of Torts* § 435 (1), which provides thus: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not prevent him from being liable."[71] However, on the other hand, if a causal sequence of events in retrospect appears to the court to be highly extraordinary and therefore unforeseeable, then the court, applying its judicial discretion, may hold that the defendant is not liable under this same proximate cause principle.[72]

For example, in the case of *Banks v. City of Richmond*,[73] defendant, a city employee, negligently failed to correct a gas leak in an apartment oven by turning off the gas meter. Stahl, a maintenance man from the apartment's rental office, lit a cigarette lighter in order to detect the source of the gas leak and was blown through the kitchen cabinets by the resulting explosion. The Virginia Supreme Court, citing *Restatement of Torts* § 435 with approval, held that what Stahl did was so "highly extraordinary" that it "completely overshadowed" any negligence of the city, and therefore the city's failure to turn off the gas was, at most, a "remote cause."[74] On the other hand, plaintiff's attorney might make an equally compelling general type of harm argument that plaintiff's resulting injuries were, in fact, foreseeable.[75]

The *Restatement (Second) of Torts* cautions, however, that it

> is impossible to state any definite rules by which it can be determined that a particular result of the actor's negligent conduct is or is not so highly extraordinary as to prevent the conduct from being a legal cause of that result. This is a matter for the judgment of the court formulated after the event, and therefore with the knowledge of the effect that was produced.[76]

c. Foreseeable and Unforeseeable Intervening Causes—In an intervening proximate cause situation, the original defendant normally creates and sets in force a causal chain of events, but the immediate trigger of the plaintiff's harm is another person or persons or a force of nature. So is the original

71. RESTATEMENT (SECOND) OF TORTS § 435 (1).

72. RESTATEMENT (SECOND) OF TORTS § 435 (2) provides thus: "The actor's conduct may be held not to be a legal cause of harm to another where after the event, and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm." *Id.*

73. Banks v. City of Richmond, 438 S.E.2d 280 (Va. 1986).

74. *Id.*

75. *See, e.g.*, Gulf Refining Co. v. Williams, 185 So. 234 (Miss. 1938) (holding that a reasonable person should have anticipated a sudden fire and explosion from a defective gasoline container, even if the cause of the spark, as the particular manner of harm, might not have been foreseeable).

76. RESTATEMENT (SECOND) OF TORTS § 435 cmt. e.

defendant still liable for the plaintiff's ultimate injuries or not? This depends on whether the subsequent intervening causes were foreseeable or unforeseeable.

It is generally held that a foreseeable intervening cause will not break the causal chain of events, and therefore the original defendant, as well as subsequent negligent defendants, if any, may still be liable to the plaintiff in the causal chain of events. An unforeseeable intervening and superseding cause, on the other hand, will relieve the original defendant from liability for his or her negligence.[77]

If an intervening cause in the causal chain of events is an act of God, or a natural event, and such an event is foreseeable, then the original defendant in the causal chain of events generally is not relieved of liability. However, if an act of God, or natural event, is "such an extraordinary manifestation of the forces of nature that it could not under normal circumstances have been anticipated or expected," then it will constitute an unforeseeable intervening, superseding cause.[78]

Intervening intentional or criminal acts are generally regarded as a superseding cause to an actor's original negligence unless the actor, at the time of his negligent conduct, realized, or should have realized, the likelihood that such a situation might have been created and that a third person might avail himself of the opportunity to commit such an intentional tort or crime.[79]

However, practitioners and courts are still faced with the interpretive conundrum of trying to decide whether an intervening force is a foreseeable intervening cause or is an unforeseeable and superseding, intervening cause. Fortunately, the *Restatement (Second) of Torts* § 442 provides some welcome guidance in this area:

> The following considerations are of importance in determining whether an intervening force is a superseding 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;

77. *See, e.g.*, Derdiarian v. Felix Contracting Corp., 434 N.Y.S.2d 166 (N.Y. 1980); Tise v. Yates Constr. Co., 480 S.E.2d 677 (1997). *See generally* KEETON ET AL., *supra* note 4, at 301–19; DOBBS, *supra* note 7, at 460–63; *see also* RESTATEMENT (SECOND) OF TORTS §§ 442, 477 (1965).

78. *See, e.g.*, S. Ry. v. Jefferson, 38 S.E.2d 334 (Va. 1946) (extraordinary and unusual flood damage); *see also* Rocky Mountain Thrift Stores Inc. v. Salt Lake City Corp., 887 P.2d 848 (Utah 1994) (unforeseeable flooding); Bradford v. Universal Constr. Co., 644 So. 2d 864 (Ala. 1994) (foreseeable high winds). *And see* RESTATEMENT (SECOND) OF TORTS § 451. *See generally* KEETON ET AL., *supra* note 4, at 314–21; DOBBS, *supra* note 7, at 474–76.

79. *See* RESTATEMENT (SECOND) OF TORTS § 448; *see, e.g.*, Alamo Rent-a-Car Inc. v. Hamilton, 455 S.E.2d 366 (Ga. Ct. App. 1995); Phan Son Van v. Pena, 990 S.W.2d 751 (Tex. 1999); Burns v. Johnson, 458 S.E.2d 448 (Va. 1995). *See generally* KEETON ET AL., *supra* note 4, at 312–13; DOBBS, *supra* note 7, at 470–74.

(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 to 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; and

(f) the degree of culpability of a wrongful act or of a third person which sets the intervening force in motion.[80]

And, once again, a plaintiff's attorney should strategically emphasize the general type of harm suffered by the plaintiff rather than the particular manner of harm,[81] while the defendant's attorney will want to emphasize the highly extraordinary and unforeseeable particular manner of the plaintiff's harm in the sequence of causal events.[82]

d. Foreseeable Extent of Harm—Courts generally distinguish between the nature of harm and the extent of harm suffered by a plaintiff in disputes involving actual and proximate causation.[83] For example, in the classic "eggshell skull" case,[84] defendant was held liable in negligence to plaintiff with a thin skull who suffered death, when an ordinary man would only have suffered a mild bump on the head.[85] The general rule, therefore, is that the defendant must "take the plaintiff as he finds him" even if the defendant's negligent act or omission caused unforeseeable consequences resulting from a plaintiff's preexisting physical condition.[86] A number of courts also include the fragile psyche of a plaintiff as well as his or her fragile health in "taking the plaintiff as you find him or her."[87]

e. Function of the Court and the Jury in Causation Cases—Finally, in negligence cases involving actual and proximate causation issues, it is generally

80. RESTATEMENT (SECOND) OF TORTS § 442.
81. *See supra* notes 67–71 and accompanying text.
82. *See supra* notes 72–76 and accompanying text.
83. *See* RESTATEMENT (SECOND) OF TORTS § 435.
84. *See*, *e.g.*, Dulieu v. White, [1901] 2 K.B. 669, 679 (1901).
85. *Id.*; *see also* David v. DeLeon, 547 N.W.2d 726 (Neb. 1996).
86. *See, e.g.*, Fuller v. Merten, 22 P.3d 1221 (Or. Ct. App. 2001); Watford v. Morse, 118 S.E.2d 681 (Va. 1961); Thompson v. Lupone, 62 A.2d 861 (Conn. 1948).
87. *See, e.g.*, Bartolone v. Jeckovich, 481 N.Y.S.2d 545 (N.Y. 1984) (psychotic breakdown triggered by a four-car collision); Steinhauser v. Hertz Corp., 421 F.2d 1169 (2nd Cir. 1970) (schizophrenia triggered by an automobile accident); *see also* Mum v. Algee, 924 F.2d 568 (5th Cir. 1991) (applying Mississippi law) (holding that Mississippi applies the "eggshell skull" rule only to preexisting medical conditions). *See generally* DOBBS, *supra* note 7, at 464–66.

the function of the court to determine (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably differ concerning the conduct of the defendant as a substantial factor in causing harm to the plaintiff, (b) whether the harm to the plaintiff is capable of apportionment among two or more causes, and (c) the question of causation and apportionment in any case in which the jury may not reasonably differ.[88]

It is the function of the jury to determine, in any case in which it may reasonably differ on the issue, (a) whether the defendant's conduct has been a substantial factor in causing harm to the plaintiff, and (b) the apportionment of the harm to two or more causes.[89]

III. CAUSATION REQUIREMENTS IN INSURANCE LAW PRACTICE[90]

Because most research and analysis of legal causation issues have largely occurred in the context of tort law,[91] many courts have applied these classic tort proximate cause principles to insurance contract disputes as well. Thus, as an earlier commentator has noted,

> Among the decided cases, it is generally taken to be beyond dispute that proximate cause is proximate cause, wherever it may be found, and the court is content with a brief definition in the traditional [tort] manner. The rule in insurance cases appears to be that the definition of proximate cause which should be applied is the same or substantially the same as in negligence cases.[92]

However, a substantial body of case law and legal commentary demonstrates that there are many important differences, as well as similarities, between legal causation issues in tort law and insurance law,[93] and that general rules of proximate causation often are applied in a different, and

88. *See* RESTATEMENT (SECOND) OF TORTS § 434 (1).

89. *See id.* § 434 (2).

90. A significant portion of the legal analysis within this section originally appeared in two prior articles: Swisher, *supra* note 3; and Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729 (2000). These important insurance causation principles are summarized below.

91. *See generally supra* notes 1–5 and accompanying text.

92. Brewer Jr., *supra* note 1, at 1167 (1961); *see also* JEFFREY STEMPEL, STEMPEL ON INSURANCE CONTRACTS §§ 7.01–7.03 (3rd ed. 2006) (discussing causation doctrines in insurance law).

93. *See, e.g.*, Sidney Simon, *Proximate Cause in Insurance*, 10 AM. BUS. L.J. 33 (1972–73); Douglas Houser & Christopher Kent, *Concurrent Causation in First Party Insurance Claims: Consumers Cannot Afford Concurrent Causation*, 21 TORT & INS. L.J. 573 (1985–86); Craig Litsey, *Property Insurance Coverage and Policy Exclusions: Problems of Multiple Causation*, 35 INS. COUNS. Q. 415 (1985); McDowell, *supra* note 3; Douglas Houser, *The Rise and Fall of Concurrent Causation: Background and Current Trends Affecting Property Insurance Coverage*, 44 FED. INS. & CORP. COUNS. Q. 3 (1993); Wurefel & Koop, *supra* note 1; Haley, *supra* note 1; Swisher, *supra* note 3.

more literal, manner in an insurance law context than in a traditional tort action. As Justice Felix Frankfurter noted in the case of *Standard Oil Co. v. United States*:[94]

> Unlike obligations flowing from duties imposed upon people willy-nilly, an insurance policy is a voluntary undertaking by which obligations are voluntarily assumed. Therefore the subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants [of an insurance policy]. It is one thing for the law to impose liability by its own terms of responsibility [as in a tort law context] and quite another to construe the scope of engagements bought and paid for [as in an insurance law context].[95]

Professor Banks McDowell also distinguishes between the prima facie elements to establish a traditional tort action and the necessary elements involved in an insurance coverage dispute. According to Professor William Lloyd Prosser, in order to establish a bona fide tort cause of action sounding in negligence, the plaintiff must prove by a preponderance of the evidence that (1) the defendant owed the plaintiff a duty of due care; (2) the defendant breached this duty of due care to the plaintiff; (3) the defendant's acts were the causal connection between the conduct and the resulting injury, i.e., the cause-in-fact and the proximate cause of the plaintiff's loss; and (4) actual loss or damage occurred to the plaintiff as a result of the defendant's actions.[96]

With insurance contract disputes, however, according to Professor McDowell, four different factors need to be considered: (1) the coverage provisions of an insurance policy (or, more generally, the promise in the contract), (2) the occurrence of the event (or, more generally, the breach), (3) the loss or damage, and (4) the causal "connector" between the event and the loss.[97] Note, however, that Professor Prosser and Professor McDowell both speak of the causation requirement as a connector or connection between the occurrence and the loss. So there are important similarities, as well as important differences, regarding the necessary tort and insurance causal requirement.

A. *Evolution of the Reasonable Expectations Doctrine in Insurance Coverage Disputes*

One crucial distinction between tort and insurance causation principles is the "reasonable expectations of the parties" doctrine as an important interpretive factor in insurance causation disputes, which was first enunciated

94. Standard Oil Co. v. United States, 340 U.S. 54 (1950).
95. *Id.* at 66.
96. KEETON ET AL., *supra* note 4, at 164–68; *see also* DOBBS, *supra* note 7, at 269–73.
97. McDowell, *supra* note 3, at 575.

in Benjamin Cardozo's seminal property insurance case of *Bird v. St. Paul Fire & Marine Insurance Co.*[98]

The facts of *Bird* were as follows: Like *Polemis*, *Wagon Mound*, and the *Kinsman* cases,[99] the *Bird* case involved a damaged vessel, which was insured under a fire and marine insurance policy by the St. Paul Insurance Company. On the night of July 30, 1916, a fire of unknown cause broke out beneath some railroad freight cars in New York Harbor. The railroad cars were loaded with explosives; and after the fire had burned for approximately thirty minutes, the contents of the railroad cars exploded. This explosion caused another fire, which in turn caused another and much greater explosion of a large quantity of dynamite and other explosives stored in the freight yard. This last explosion caused a concussion of air, which damaged plaintiff's vessel about 1,000 feet distant. No fire reached the vessel.

The question for Judge Cardozo was whether this loss was covered under St. Paul's fire insurance policy provisions, which provided coverage for a "direct loss caused by fire." Although Cardozo conceded that there "is no doubt when fire spreads to an insured building and there causes an explosion, the insurer is liable for all damages,"[100] and although the trial court had found for the plaintiff policyholder, Cardozo nevertheless reversed and rendered judgment for the defendant insurer largely based upon insurance proximate cause principles.

Initially, Cardozo's reasoning appeared to parallel the direct versus indirect causation argument utilized in *Polemis*[101] and in Andrews's dissent in *Palsgraf*.[102] First, Cardozo opined that the damage to the vessel constituted "damage by concussion, and concussion is not fire nor the immediate consequences of fire."[103] Then Cardozo discussed the important insurance law proximate cause issue involved in this case:

> The case, therefore, comes to this: Fire must reach the thing insured, or come within such proximity to it that damage, direct or indirect, is within the compass of reasonable probability. Then only is it a proximate cause, because then only may we suppose that it was within the contemplation of the contracting parties, and not merely in the physical bond of union between events, which solves, at least for the jurist, this problem of causation.[104]

Here, then, was the underlying rationale, and the genius, of Cardozo's proximate cause analysis involving this insurance coverage dispute. Proximate

98. 120 N.E. 86 (N.Y. 1918).
99. *See supra* notes 53–54, 64–66, and accompanying text.
100. 120 N.E. at 86.
101. *See supra* note 53 and accompanying text.
102. *See supra* notes 50–52 and accompanying text.
103. 120 N.E. at 87.
104. *Id.* at 88.

cause in an insurance law context should not always be determined solely through an objective tort test of foreseeable harm, as applied in the *Wagon Mound* and *Kinsman* cases.[105] Rather, proximate cause in insurance coverage disputes must also be determined according to the reasonable expectations of the contracting parties: "General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making a business contract. It is his intention, express or fairly to be inferred, that counts."[106]

This evolutionary (some would say revolutionary) definition of proximate cause principles in an insurance law context, applicable to both the insured and the insurer alike,[107] arguably was an important precursor to Professor Arthur Corbin's famous first axiom of contract law: "The Main Purpose of Contract Law is the Realization of Reasonable Expectations Induced by Promises."[108]

Moreover, Cardozo's contractually based reasonable expectations doctrine enunciated in *Bird* arguably led to an increased utilization, through a number of contractually based reasonable expectations rights and remedies, of important insurance law interpretive rules in order to determine the scope of the parties' intent, contractual duties, and obligations and the meaning of disputed terms in an insurance contract, including (1) the doctrine of ambiguities or contra proferentem; (2) contract unconscionability and public policy issues; (3) equitable remedies such as waiver, equitable estoppel, promissory estoppel, election, and contract reformation; and (4) a number of other interpretive rules applied to standardized insurance contracts as contracts of adhesion.[109]

Indeed, this contractually based reasonable expectations doctrine was firmly established at the time Professor (now Judge) Robert Keeton propounded his groundbreaking 1970 "rights at variance with the policy language" reasonable expectations doctrine.[110] However, a significant majority

105. *See supra* notes 64–66 and accompanying text.

106. 120 N.E. at 87.

107. In a subsequent decision, *Smith v. Northwestern Fire & Marine Insurance Co.*, 159 N.E. 87, 92 (N.Y. 1927), Cardozo recognized that insurers as well as insureds could invoke this contractually based reasonable expectations doctrine. *See also* Robert Jerry II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 32 (1998–99) ("Cardozo viewed reasonable expectations as a two-way street: each party was entitled to assert them to the other. Thus, in an insurance setting, Cardozo thought it as important to consider the reasonable expectations of insurers as it was to examine the [reasonable] expectations held by the insureds.")

108. 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.1 (1952); *see also* GORDON SCHARBER & CLAUDE ROWHER, CONTRACTS 147 (3rd ed. 1990) ("One purpose of contract law is to protect the reasonable expectation of persons who become parties to the bargain.").

109. *See generally* Swisher, *supra* note 90, at 735–47.

110. *See* Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970) (Part I); 83 HARV. L. REV. 1281 (1970) (Part II). As propounded by Professor Keeton, this functional (as opposed to contractual) reasonable expectations doctrine is based

of courts today have expressly rejected the Keeton "rights at variance with the policy language" reasonable expectations doctrine in favor of a more traditional contractually based doctrine of reasonable expectations largely based upon the doctrine of ambiguities.[111]

B. *Immediate Cause Versus Efficient or Dominant Proximate Cause*

An important legacy of *Bird* and subsequent insurance causation cases is the issue of whether the necessary causal nexus for an insurance loss needs to be the "immediate" cause of the loss or whether it can also be the "efficient" or "dominant" proximate cause along a causal chain of events.[112] American courts have split on this important legal concept.[113]

The traditional insurance law rule, based on early English and American precedent,[114] is that the cause of loss in an insurance law context must be the immediate cause of the loss, as opposed to the proximate cause of the loss.[115] The underlying rationale behind this immediate cause test was

upon a two-prong rationale: (1) that an insurer should be denied any unconscionable advantage in an insurance contract; and (2) that the reasonable expectations of insurance applicants and intended beneficiaries regarding the terms of insurance coverage should be honored, even though a painstaking study of the policy provisions contractually would have negated those expectations. *Id. at* 963–64. A small minority of state courts today have adopted this insurance law doctrine of reasonable expectations at variance with the insurance policy language. *See generally* Symposium, *The Insurance Law Doctrine of Reasonable Expectations After Three Decades*, 5 CONN. INS. L.J. 1 (1998–99).

111. *See, e.g.*, Deni Assocs. of Fla. Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1140 (Fla. 1998)

> We decline to adopt the [Keeton] doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged.

See also Ligatt v. Employers Mut. Cas. Co., 46 P.3d 1120, 1128 (Kan. 2002) ("[A]mbiguity is a condition precedent to the application of the reasonable expectations doctrine."); Wilke v. Auto-Owners Ins. Co., 664 N.W.2d 776, 787 (Mich. 2003) ("The rule of reasonable expectations clearly has no application when interpreting an unambiguous contract because a policyholder cannot be said to have reasonably expected something different from the clear language of the [insurance] contract."). *And see* Swisher, *supra* note 90.

112. *Proximate cause* in the construction of an insurance policy generally is synonymous with *direct cause*, and *efficient cause* generally means *dominant* or *predominant cause*.

113. Professor Jeffrey Stempel characterizes these two causal approaches as (1) the cause nearest the loss and (2) the dominant cause of loss. *See* STEMPEL, *supra* note 92, at 7.02.

114. *See, e.g.*, McDonald v. Snelling, 96 Mass. 290, 294 (1867) ("[C]ausa proxima, in suits for damages at common law, extends to the natural and probable consequences of a breach of contract or tort, while in insurance cases... it is limited to the immediately operating cause of the loss or damage."); Fenton v. Thorley & Co., [1903] A.C. 443, 454 (1903) ("In an action on [an insurance] policy, the causa proxima is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of tort the causa causans is by no means disregarded."); *see also* Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 492 (1924) ("The common understanding is that in construing these [insurance] policies we are not to take broad views, but generally are to stop our inquiries with the cause nearest the loss.")

115. *See, e.g.*, Nat'l Fire Ins. Co. v. Calero Energy Co., 777 S.W.2d 501, 505 (Tex. Civ. App. 1989); Ovbey v. Cont'l Ins. Co., 613 F. Supp. 726, 728–29 (N.D. Ga. 1985); Frontier Lanes v. Can. Indem. Co., 613 P.2d 166, 169 (Wash. Ct. App. 1980).

explained by the Washington State Supreme Court in the case of *Bruener v. Turin City Fire Insurance Co.*:[116]

> In the rare instances where proximate cause has any bearing in contract cases, it has a different meaning than when used in tort.... In tort cases, the rules of proximate cause are applied for the single purpose of fixing culpability, with which insurance cases are not concerned.... The question [in tort cases] is always, why did the injury occur? Insurance cases are not concerned with why the injury occurred or the question of culpability, but only with the nature of the injury and how it happened.[117]

This immediate cause rule, however, is not an inflexible nor an absolute rule. The insurance policy language itself may require the application of a proximate cause rule in some cases,[118] and other circumstances may exist where a strict application of the immediate cause rule would be unfair and "contrary to common sense and reasonable judgment" or negate the reasonable expectations of the policyholder to coverage. For example, the Second Circuit Court of Appeals, in the case of *Blaine Richards & Co. v. Marine Indemnity Insurance Co. of America*,[119] wrote,

> We do not agree that proximate cause in insurance matters is to be determined by resort to "but for" causation. As this Circuit has noted, "the horrendous niceties of the doctrine of so-called "proximate cause" employed in negligence suits, apply in a limited manner to insurance policies."...At the same time, the single cause nearest to the loss in time should not necessarily be found to be the proximate cause.... Instead, in accord with the reasonable understanding and [reasonable] expectations of the parties we must attempt to ascertain..." the predominant and determining"...cause of loss.... Determination of proximate cause in these cases is thus a matter of applying common sense and reasonable judgment as to the source of the losses alleged.[120]

A growing number of American courts, therefore, have rejected a strict immediate cause rule in favor of an efficient or dominant proximate cause rule, analogous to a tort-based proximate cause rule, in order to validate the reasonable expectations of the insured policyholder to coverage.[121]

116. 222 P.2d 833 (Wash. 1950).

117. 222 P.2d at 834–35 (Wash. 1950). *Bruener*, however, was subsequently overruled by the case of *Graham v. Public Employees Mutual Insurance Co.*, 656 P.2d 1077, 1081 (Wash. 1983), which adopted the efficient or dominant proximate cause rule.

118. *See, e.g.*, State Farm Mut. Ins. Co. v. Partridge, 109 Cal. Rptr. 811, 815–16 (Cal. 1973); Kane v. Royal Ins. Co. of Am., 768 P.2d 678, 684–85 (Colo. 1989).

119. 635 F.2d 1051 (2nd Cir. 1980) (applying New York law).

120. 635 F. 2d at 1054–55 (citations omitted) *see also* Pan Am. World Airways v. Aetna Cas. & Sur. Co., 505 F.2d 989 (2nd Cir. 1974) (similar holding).

121. *See, e.g.*, Assurance Co. of Am. v. Jay-Mar Inc., 38 F. Supp. 2d 349, 353–53 (D.N.J. 1999); *see also* TNT Speed & Sport Ctr. Inc. v. Am. States Ins. Co., 114 F.3d 731, 733 (8th Cir. 1997) (applying Missouri law); State Farm Mut. Auto. Ins. Co. v. Roberts, 697 A.2d 667 (Vt. 1997).

Under this reasonable expectations hybrid of tort and contract causation law, there will be coverage if a risk of loss that is specifically insured against in the insurance policy sets in motion, in an unbroken causal sequence, the events that cause the ultimate loss, even though the last immediate cause in the chain of causation is an excluded cause.[122]

Which, then, is the better-reasoned rule: the immediate cause rule or the efficient or dominant proximate cause rule? Clearly, the immediate cause rule cannot be applied in all circumstances, especially when it is unfair and contrary to the intent and the reasonable expectations of the contracting parties. On the other hand, the efficient or dominant proximate cause rule should not be applied to insurance coverage disputes when the initial cause in a causal chain of events is too remote. The better-reasoned approach, therefore, in order to validate the reasonable expectations of the contracting parties, would be to permit a court to apply either the immediate cause rule or the efficient or dominant proximate cause rule according to which rule would provide coverage in a particular insurance contract dispute, especially if there was policy language that arguably was ambiguous.[123]

122. *See, e.g.*, *Graham*, 656 P.2d at 1081 (holding that where a peril specifically insured against set other causes in motion that, in an unbroken sequence between the act and the final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is the efficient or predominant cause that sets into motion the chain of events producing the loss that is regarded as the proximate cause, not necessarily the last act in a chain of events); *see also* John Drennon & Sons Co. v. N.H. Ins. Co., 637 S.W.2d 339, 341 (Mo. Ct. App. 1982); Safeco Ins. Co. v. Hirschmann, 760 P.2d 969 (Wash. Ct. App. 1988) (similar holdings).

123. *See, e.g.*, Key Tronic Corp. v. Aetna Fire Underwriters Ins. Co., 881 P.2d 201, 206 (Wash. 1994); *see also* ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 6.07, at 389–92 (3rd ed. 1995):

> Whether a court applies the immediate cause rule [or the "efficient" or "dominant" proximate cause rule] might depend upon whether one is considering a "cause" that would exclude coverage or one that would create coverage. If the policy language is ambiguous, a court should adopt the immediate cause rule when the rule would serve to render an exclusion inapplicable, even though the court would apply [the "efficient" or "dominant" proximate cause rule] when applying a policy provision extending coverage.

Id. And see STEMPEL, *supra* note 92, at § 7.02:

> The common thread running through these decisions appears to be one in which courts are more attracted to a strict proximity [or "immediate cause"] rule and focus on the cause physically nearest the loss (the last event in the causal chain) where this benefits the policyholder in a coverage dispute, either by bringing the claim within the scope of the policy, or avoiding the potential application of an exclusion. Conversely, where the causes physically closest to the loss are uncovered, courts will implicitly or expressly use ["efficient" or "dominant" proximate cause] analysis to find a more remote but covered peril to constitute the "efficient proximate cause" of the loss. Not surprisingly, the tendency is more pronounced where the potentially excluding policy language is arguably ambiguous.

Id.

C. *Multiple Concurrent Causation*

American courts have utilized three different approaches with insurance causation disputes involving multiple concurrent causation. On one extreme, a minority of courts still apply a traditional conservative approach, which tends to restrict coverage in most concurrent causation situations. Under this traditional conservative approach, if a covered cause combines with an excluded cause to produce a loss, then the insured cannot recover under the policy based on the underlying rationale that an insurer should not be held responsible for any loss caused by an excluded peril.[124] The weakness of this traditional approach, however, is that the reasonable expectations of the insured to coverage, even under a "common insured in the marketplace" standard,[125] are easily frustrated and abrogated.

On the other extreme, some courts have adopted the so-called California rule, holding that when loss occurs through the concurrence of covered and excluded risks, the insurer would be liable for the entire loss as long as at least one of the covered risks was a proximate cause of the loss.[126] The advantage of this liberalized California approach, at least for the insured policyholder, is that when various causes combine to produce an insured loss, a dominant or predominant efficient cause need not be shown—only a minimally sufficient proximate cause. The major disadvantage of this liberalized concurrent causation rule, however, is that the insurer probably never intended to provide such broad coverage under its policy; and, not surprisingly, a number of commentators in various insurance defense journals have strongly attacked the California rule.[127]

124. *See, e.g.*, Lydick v. Ins. Co. of N. Am., 187 N.W.2d 602, 605 (Neb. 1971) (holding that under this general rule, if a covered hazard combines with a hazard expressly excluded from the policy coverage to produce a loss, the insured may not recover); Graff v. Farmer's Home Ins. Co., 317 N.W.2d 741 (Neb. 1982) (similar holding); *see also* Abady v. Hanover Fire Ins. Co., 266 F.2d 362 (4th Cir. 1959) (purportedly applying Virginia law); Niagara Fire Ins. Co. v. Muhle, 208 F.2d 191 (8th Cir. 1953) (applying Missouri law); Coyle v. Palatine Ins. Co., 222 S.W. 973 (Tex. Civ. App. 1920).

125. *See, e.g.*, Dixon v. Gunter, 636 S.W.2d 437, 441 (Tenn. Ct. App. 1982); Barber v. Old Republic Life Ins. Co., 647 P.2d 1200, 1202 (Ariz. Ct. App. 1982) (both stating that an insurance contract should be given a fair and reasonable construction consonant with the plain intention of the parties, a construction that would be given to the contract by "an ordinary intelligent business man" or "an average layperson who is untrained in either law or insurance").

126. *See, e.g.*, Safeco Ins. Co. v. Guyton, 692 F.2d 551 (9th Cir. 1982) (applying California law); Sabella v. Wisler, 27 Cal. Rptr. 689 (Cal. 1963); State Farm Mut. Auto. Ins. Co. v. Partridge, 109 Cal. Rptr. 811 (Cal. 1973); *see also* Mattis v. State Farm Fire & Cas. Co., 454 N.E.2d 1156 (Ill. 1983); Vormelker v. Oleksinski, 199 N.W.2d 287 (Mich. Ct. App. 1972); Henning Nelson Constr. Co. v. Fireman's Fund, 361 N.W.2d 446 (Minn. Ct. App. 1985); Benke v. Mukwonago Vernon Mut. Ins. Co., 329 N.W.2d 243 (Wis. 1982).

127. *See, e.g.*, Houser & Kent, *supra* note 93; Litsey, *supra* note 93; Houser, *supra* note 93; Wurefel & Koop, *supra* note 1.

Subsequently, the California Supreme Court itself, under then-Chief Justice Malcolm Lucas, repudiated the California rule in favor of requiring a dominant or predominant efficient causal nexus involving issues of concurrent causation.[128]

The more realistic and better-reasoned approach to concurrent causation issues in insurance coverage disputes, in order to validate both the insurer's contractual rights and obligations as well as the insured's reasonable expectations of coverage, would be to require the finding of a covered dominant or predominant efficient cause in any concurrent causation controversy. Under this realistic middle ground concurrent causation approach, which is the prevailing rule in a majority of jurisdictions today, if multiple concurrent causes exist and if the dominant or predominant efficient cause is a covered peril, then coverage would exist for the entire loss even though other concurrent causes are not covered under the policy.[129] If

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These commentators make a careful distinction between property insurance concurrent causation issues (i.e., the *Sabella* case) and liability insurance concurrent causation issues (i.e., the *Partridge* case). In *Sabella*, 27 Cal. Rptr. 689 (Cal. 1963), the insureds sought coverage under their homeowners' policy, and they also brought a tort action against the contractor who built their house on inadequately compacted landfill. The court held that under the property insurance claim, the land-settling exclusion in the homeowners' policy did not preclude liability because a leaking pipe was the proximate cause of the loss, not the land settling. In the tort action, the *Sabella* court held that the insureds also could recover against the contractor due to his negligent construction.

In *Patridge*, 109 Cal. Rptr. 811 (Cal. 1973), no first-party policy was involved. This was a personal liability insurance case, involving an automobile, brought by a passenger against the driver. The passenger was injured when the insured driver negligently drove off a paved highway while pursuing a rabbit and a .357 magnum pistol, which the insured had filed down so the pistol would have a hair trigger, went off, injuring the passenger. The driver sought liability coverage under both his automobile insurance policy, which covered injuries arising out of the use of the automobile, and his homeowners' policy, which explicitly excluded injuries arising out of the use of the automobile. Neither the negligent driving nor the hair trigger alone would have caused the injury. The California Supreme Court in *Partridge* held thus:

> [T]he "efficient cause" language is not very helpful, for here both causes were independent of each other: the filing of the trigger did not "cause" the careless driving, nor vice versa. Both, however, caused the injury. In traditional tort jargon, both are concurrent proximate causes of the accident. Although there may be some question whether either of the two causes in the instant case can be properly characterized as the "prime," "moving," or "efficient" cause of the accident, we believe that coverage under a liability insurance policy is available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries. That multiple causes may have effectuated the loss does not negate any singe cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act.

Patridge, 109 Cal. Rptr. at 818 n.10. *See generally* Houser & Kent, *supra* note 93, at 575.

128. *See, e.g.*, Garvey v. State Farm Fire & Cas. Co., 257 Cal. Rptr. 292 (Cal. 1989); State Farm Fire & Cas. Co. v. von der Lieth, 2 Cal. Rptr. 2d 183 (Cal. 1991).

129. *See, e.g.*, Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040 (4th Cir. 1979) (applying Maryland law); Ovbey v. Cont'l Ins. Co., 613 F. Supp. 726 (N.D. Ga. 1985), *aff'd*, 728 F.2d 178 (11th Cir. 1986); *von der Lieth*, 2 Cal. Rptr. 2d 183; Hahn v. MFA Ins. Co., 616 S.W.2d 574 (Mo. Ct. App. 1981); Grace v. Litiz Mut. Ins. Co., 257 So. 2d 217 (Miss. 1972); Yunker v. Republic-Franklin Ins. Co., 442 N.E.2d 108 (Ohio Ct. App. 1982); King v. N. River Ins. Co., 297 S.E.2d 637 (S.C. 1982).

neither cause is dominant, then loss will probably be attributed to the cause that would result in coverage.[130]

This dominant or predominant efficient concurrent causation approach therefore is justified, not only because it honors the reasonable expectation of the policyholder to coverage and disallows the insurer any unconscionable advantage, but also because of the rationale of liberally resolving any ambiguities regarding coverage in favor of the insured and strictly construing such ambiguities against the insurer.[131]

D. Anti-Concurrent Causation Clauses in Property Insurance Policies

During the past decade or so, various insurance companies have revised their standardized insurance policies in an apparent effort to make the traditional conservative approach to concurrent causation[132] binding upon the parties through express contractual language appearing within the insurance policy itself. For example, a 1990 version of the homeowners' property insurance form drafted by the Insurance Services Office (ISO) includes language introducing the policy's exclusions, which states thus: "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."[133]

According to Professor Robert Jerry II, by its policy terms

> this language seems to say that if an excluded cause is part of any sequence that results in a loss, the loss is not covered, even if a covered cause contributes concurrently or sequentially to the loss. So construed, this language greatly narrows coverage.... A windstorm (covered) that produces a large wave (excluded) that destroys a building would be outside coverage, even if the wind produces the wave.[134]

Or perhaps not. Although a number of courts have recognized these so-called anti-concurrent causation clauses by enforcing the insurer's exclusionary policy language in overcoming the efficient or dominant proximate cause rule and excluding coverage when loss is caused by a combination

130. *See, e.g.*, Aetna Cas. & Sur. Co. v. Lumbermens Mut. Cas. Co., 527 N.Y.S.2d 143, 145 (App. Div. 1988); Wasecu Mut. Ins. Co. v. Noska, 331 N.W.2d 917, 920–23 (Minn. 1983); Shirone, Inc. v. Ins. Co. of N. Am., 570 F.2d 715 (8th Cir. 1987) (applying Iowa law).

131. *See generally* ROBERT JERRY II, UNDERSTANDING INSURANCE LAW § 67 (3rd ed. 2002); ROBERT KEETON & ALAN WIDISS, INSURANCE LAW § 5.5 (1988); William Lasher, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175 (1982).

132. *See supra* notes 124–25 and accompanying text.

133. ISO, HOMEOWNERS POLICY—BROAD FORM [HO 00 03 04 91] (1990).

134. JERRY II, *supra* note 131, § 67[d]. For an earlier "wind versus water" concurrent causation case that applied the traditional conservative approach denying coverage to the insured policyholder, *see Niagara Fire Insurance Co. v. Muhle*, 208 F.2d 191 (8th Cir. 1953) (applying Missouri law).

of covered and excluded perils,[135] other courts have refused to enforce these anti-concurrent causation clauses based on underlying public policy reasons.[136] Attorney Douglas Widin warns that the "danger with the anti-concurrent causation clause is that it could in theory tempt an insurer to take it to an unreasonable extreme, which in turn could cause a court to overreact and construe the clause too narrowly, creating an undesirable precedent."[137]

Continuing property insurance coverage disputes resulting from the terrible devastation caused by Hurricane Katrina in August of 2005 to New Orleans and the Gulf Coast region also have attempted to deal with these concurrent causation issues. Specifically, in the case of *Buente v. Allstate Insurance Co.*,[138] Senior Judge L. T. Senter Jr. characterized the major dispute as

> whether losses attributable to "storm surge" are covered losses because the "storm surge" is wind driven, which was covered, or whether losses attributable to "storm surge" are excluded from coverage because such damages are caused by "water" (Exclusion 4) or by "flood, including but not limited to surface water, waves, tidal waves or overflow of any body of water, or spray from any of these whether or not driven by wind" (Exclusion 1).[139]

In a subsequent case,[140] the *Buente* plaintiffs asserted that these exclusions, which the judge referred to collectively as the policy's "flood exclusions,"

135. *See, e.g.*, Paulucci v. Liberty Mut. Fire Ins. Co., 190 F. Supp. 2d 1312 (M.D. Fla. 2002) (applying Florida law) (recognizing that although Florida law recognized multiple concurrent causation, the parties could contract around that law through an anti-concurrent causation clause); *see also* State Farm Fire & Cas. Co. v. Bongen, 925 P.2d 1042 (Alaska 1996); Ramirez v. Am. Family Mut. Ins. Co., 652 N.E.2d 511 (Ind. Ct. App. 1995); Kula v. State Farm Fire & Cas. Co., 628 N.Y.S.2d 988 (App. Div. 1995); Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272 (Utah 1993).

136. *See, e.g.*, Murray v. State Farm Fire & Cas. Co., 509 S.E.2d 1, 14 (W. Va. 1998) (holding that the anti-concurrent causation clause reaches a result contrary to the reasonable expectations of the policyholder to coverage); Safeco v. Hirschmann, 773 P.2d 413, 415 (Wash. 1998) ("Safeco's purpose in modifying the exclusion is clear; the [anti-concurrent causation clause] language prefacing the exclusions is an attempt to exclude from coverage losses connected with certain perils *no matter how insignificant those perils might have been to the loss*") (emphasis in original).

137. *See* Douglas Widin, *Katrina, Causation, and Coverage: Which Way Will the Wind Blow?* 41 TORT & INS. L. J. 901, 925–27 (2006) (citing with approval Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903, 908 (Cal. 2005)) ("If we were to give full effect to the [anti-concurrent causation clause] policy language excluding coverage whenever an excluded peril is a contributing or aggravating factor in the loss, we would be giving insurance companies carte blanche to deny coverage in nearly all cases....") This California middle ground approach holds that an excluded cause that makes only a minor contribution to loss will not defeat coverage, no matter what the policy language states. *Id.* at 926.

138. 422 F. Supp. 2d 690 (S.D. Miss. 2006).

139. *Id.* at 696. The Allstate policy also contained Provision 15, which stated in relevant part: "We do not cover loss to property when: (a) there are two or more causes of loss to the covered property; and (b) the predominant cause(s) of loss is (are) excluded under Losses We Do Not Cover...."

140. Buente v. Allstate Prop. & Cas. Ins. Co., NO. 1:05-cv-712, 2006 U.S. Dist. LEXIS 23742 (S.D. Miss. 2006) (Apr. 11, 2006).

were ambiguous and unenforceable in the context of property damage sustained in Hurricane Katrina, and plaintiffs requested partial summary judgment. Defendant contended that these policy exclusions were unambiguous and should be enforceable. The judge found the insurer's exclusions to be clear and unambiguous and denied plaintiff's motion for partial summary judgment.[141]

How should these *Buente* decisions be interpreted? Although the April 11, 2006, *Buente* decision was seen by insurers as a significant victory,[142] other commentators believed that the policyholders had gained significant ground as well.[143] In the case of *Leonard v. Nationwide Mutual Insurance Co.*,[144] the federal district court for the Southern District of Mississippi found that Nationwide's anti-concurrent causation policy clause, which purported to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damage caused by the effects of wind (a covered loss), was ambiguous.[145]

It is clear, however, that whether Hurricane Katrina's "storm surge" was wind-driven or was subject to the insurers' various flood exclusions, these Hurricane Katrina property insurance coverage disputes will continue to be litigated in Louisiana, Mississippi, and Alabama well into the foreseeable future; and practitioners, judges, and legal commentators will await how the Louisiana, Mississippi, and Alabama Supreme Courts interpret and apply the insurers' anti-concurrent cause policy language.

E. *Establishing a Substantial or Sufficient Causal Nexus*

Even though a majority of courts apply a dominant or predominant efficient proximate cause approach to concurrent causation insurance coverage disputes,[146] one commentator, Craig Litsey, notes that the major problem with this proximate cause approach is that "courts have applied the concept inconsistently by giving different meanings to various aspects of the concept at different times."[147] Ultimately, he concedes that courts and juries must rely on "common sense and reasonable judgment" to identify what constitutes a dominant or substantial cause of loss; and, as Professor William Lloyd Prosser observes, this is a decision "upon which

141. *Id.*

142. *See, e.g.*, Daniel Hays, *Insurers Win Big Round in Flood Case*, NAT'L UNDERWRITER (Prop. & Cas. Ed.), Apr. 24, 2006, at 8.

143. *See, e.g.*, Peter Geier, *Judges Play Katrina Suits Down the Middle*, NAT'L L.J., July 3, 2006, at 6 ("Judge Senter gave homeowners the chance to prove that wind destroyed the premises before the flood got there, which was a big win for homeowners. But he also maintained the integrity of the insurer's flood exclusion.") (quoting attorney Randy Maniloff).

144. 438 F. Supp. 2d 684 (S.D. Miss. 2006).

145. *Id.* at 693.

146. *See supra* notes 136–40 and accompanying text.

147. *See* Litsey, *supra* note 93, at 436–37.

all the learning, literature and lore of the law are largely lost. It is a matter upon which any layman is quite as competent to sit in judgment as the most experienced court."[148]

So, query: Are these legal causation concepts just another judicial weapon utilized by legal formalists[149] and legal functionalists[150] in their continuing battle for the "heart and soul" of insurance contract law?[151] Not necessarily, because whether a judge is a legal formalist or a legal functionalist, judges within both these jurisprudential schools still agree that if a disputed insurance contract is deemed to be of questionable coverage or is unfair to the parties involved, then a judge does have the right and the power to address this contractual dispute through a number of well-recognized contractual remedies,[152] and through insurance causation principles as well.

148. *Id.* (citing PROSSER ON TORTS § 41 (4th ed. 1971)).

149. Legal formalism, also known as legal positivism, is the traditional view that correct legal decisions are determined by preexisting judicial and legislative precedent, and a judge must interpret the law in a logical, socially neutral manner. *See, e.g.*, Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (discussing how legal formalism still serves a legitimate function today in limiting judicial discretion and judicial activism).

In an insurance law context, legal formalism is best exemplified by the seminal writings and major influence of Professor Samuel Williston relating to American contract law in general and American insurance law in particular. The bedrock principle underlying Williston's formalistic view of insurance contract interpretation is that an insurance policy must be construed and enforced according to general principles of contract law, and courts therefore are not at liberty to reinterpret or modify the terms of a clearly written and unambiguous insurance policy but must look at the "plain meaning" of the insurance contract. 2 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 6:3 (4th ed. 1998). *See generally* Swisher, *supra* note 90, at 748–52.

150. Legal functionalism, also known as legal realism, is based on the belief that the formalist theory of a logical and socially neutral legal framework is rarely attainable, and may be undesirable, in a changing society; and the paramount concern of the law should not be logical consistency, but socially desirable consequences. Thus, where legal formalism is more logically based and precedent-oriented, legal functionalism is more sociologically based and result-oriented. *See, e.g.*, GARY AICHELE, LEGAL REALISM AND TWENTIETH CENTURY AMERICAN JURISPRUDENCE (1990).

In an insurance law context, legal functionalism is best exemplified by the seminal writings and major influence of Professor Arthur Corbin relating to American contract law in general and American insurance law in particular. Professor Corbin was a major critic of Professor Williston's plain meaning analysis of insurance contracts. According to Professor Corbin, "The main purpose of contract law is the realization of the reasonable expectations" of the contracting parties, and there "is no single rule of interpretation of language, and there are no rules of interpretation taken all together, that will infallibly lead to the one correct understanding and meaning." 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1:1 (rev. ed. 1993). *See generally* Swisher, *supra* note 90, at 753–58.

151. *See generally*, Jerry II, *supra* note 107; *see also* Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1074 (1991) ("It is not enough, therefore, to understand insurance law 'in the books' and insurance law 'in action.' One must also know the judge—and understand the jurisprudential philosophy of each particular court.")

152. *See, e.g.*, Swisher, *supra* note 90, at 755:

Accordingly, numerous courts and juries have agonized over many years, and many insurance coverage disputes, to determine how substantial or sufficient a causal nexus needs to be, but there does not appear to be any overarching rule to answer this basic question. For example, in fire and property insurance coverage disputes, the courts are split as to whether or not damage by heat, smoke, or soot would come within fire insurance coverage as a "direct loss"[153] caused by fire.[154] Although some courts interpret a direct loss caused by fire to require actual ignition, burning, or charring,[155] the better-reasoned reasonable expectations modern approach would allow recovery for smoke and soot damage along a direct causal chain of events constituting a direct loss caused by fire.[156]

Automobile liability insurance coverage disputes likewise frequently involve the determination of a causal nexus from loss "arising out of the ownership, maintenance, or use" of an automobile or another insured vehicle. Although some earlier courts have applied a very restrictive interpretation of the word *use* of an automobile to mean the actual "operation" of the vehicle,[157] a majority of courts today have held that the use of an automobile is not necessarily synonymous with driving or operating the vehicle, and

Accordingly Professor Corbin—like Professor Williston—was not willing to reject a number of well-established rules of contract interpretation in pursuit of his more functional and contextual approach to contract law, and Professor Corbin—like Professor Williston—therefore continued to recognize a large number of traditional interpretive rules of contract interpretation to help ascertain the parties' reasonable expectation to coverage, including: contract ambiguity and the doctrine of contra proferentem; contract unconscionability and public policy issues; and equitable remedies such as waiver, equitable estoppel, promissory estoppel, election, and reformation of contract. A fair reading of both *Williston on Contracts* and *Corbin on Contracts* therefore suggests that there are far more similarities than differences in their respective approaches to contract law in general, and insurance coverage disputes in particular.

Id.

153. *Proximate cause* in the construction of an insurance policy generally is synonymous with *direct cause*, and *efficient cause* generally means *dominant* or *predominant cause*.

154. *See, e.g.*, A.M. Vann, Annotation, *Loss by Heat, Smoke, or Soot Without External Ignition as Within a Standard Fire Insurance Policy*, 17 A.L.R.3d 1155 (1968). This annotation also discusses the archaic, but still widely recognized, insurance law distinction between a "friendly" fire and a "hostile" fire.

155. *See, e.g.*, Wash. State Hop Producers Inc. v. Harbor Ins. Co., 660 P.2d 768 (Wash. Ct. App. 1983) (holding that there was no evidence of any flame or glow to constitute a direct loss by fire when 253 bales of hops stored in plaintiff's warehouse were damaged by "browning").

156. *See, e.g.*, Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co., 98 N.W.2d 280 (Minn. 1959) (an off-premises fire set in motion a train of events that brought about the smoke and soot damage of which plaintiff complained, thus constituting a direct loss caused by fire). *See generally* Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 625–28 (1996).

157. *See, e.g.*, Kienstra v. Madison County Mut. Auto. Ins. Co., 44 N.E.2d 944 (Ill. App. Ct. 1942) (defining *use* as the "operation" of the vehicle).

it is sufficient to show only that the accident was "connected with," "grew out of," or "flowed from" the use of the automobile.[158]

The courts are split, however, as to whether a substantial causal nexus involving the use of a vehicle is required[159] or whether only a minimal or sufficient causal nexus is required in order to validate the insured's reasonable expectation to coverage.[160] This same causal conundrum is illustrated in a number of cases discussing whether the accidental discharge of a firearm in an automobile constitutes the use of that vehicle for automobile liability insurance coverage purposes. Not surprisingly, the courts are split on this causal issue as well.[161]

So is this causation conundrum between a substantial and a sufficient causal nexus in automobile insurance coverage disputes just one more example of the continuing jurisprudential battle between legal formalists and legal functionalists for the "heart and soul" of insurance contract law?[162]

158. *See, e.g.*, Unigard Mut. Ins. Co. v. Abbott, 732 F.2d 1414 (9th Cir. 1984) (applying Montana Law); State Farm Mut. Ins. Co. v. Smith, 691 P.2d 1289 (Idaho Ct. App. 1984). *See generally* Larry D. Schaefer, Annotation, *Automobile Liability Insurance: What Are Accidents or Injuries "Arising Out of Ownership, Maintenance, and Use" of an Insured Vehicle*, 15 A.L.R.4th 10 (1982); George Sayers, *Coverage Problems Relating to the Policy Term "Arising out of the Use" of a Vehicle*, 36 INS. COUNS. J. 253 (1969).

159. A "substantial" causal nexus generally would involve a dominant or predominant efficient cause.

160. *Compare* Lumbermen's Mut. Cas. Co. v. Logan, 451 N.Y.S.2d 804 (App. Div. 1982) (holding that an automobile insurer was not liable to its insured for an accident "arising out of the ownership, maintenance, or use" of the automobile when the injury resulted from the insured's fall in an icy automobile parking lot), *with* Novak v. GEICO, 424 So. 2d 178 (Fla. Dist. Ct. App. 1983) (holding that an insured was covered for loss "arising out of the ownership, maintenance, or use" of her automobile when she was shot in her driveway after refusing an assailant's request to give him a ride in her car).

161. *Compare* Southeastern Fid. Ins. Co. v. Stevens, 236 S.E.2d 550 (Ga. Ct. App. 1977), *and* Fid. & Cas. Co. v. Lott, 273 F.2d 55 (5th Cir. 1950) (applying Texas law) (both finding coverage existed), *with* U.S. Fid. & Guar. Co. v. W. Fire Ins. Co., 450 S.W.2d 491 (Ky. 1970), *and* State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co., 543 P.2d 645 (Wash. Ct. App. 1975) (both finding no coverage existed). *See also* Swisher, *supra* note 156, at 625–29.

162. *See, e.g.*, Jerry II, *supra* note 107, at 55–56:

> On one side are the formalists or classicists, whose champions are Professor Williston and the first RESTATEMENT OF CONTRACTS. The formalists care mightily about texts and the four corners of documents. They believe that words often have a plain meaning that exists independently of any sense in which the speaker or writer may intend the words. They insist that a court or a party can discern the meaning of contractual language without asking about the intentions or expectations of the parties. They contend that interpretation is appropriate only if an ambiguity appears on the face of the document, which means that the parties by their own testimony about what they intended or expected cannot create an ambiguity where none exists.... In the world of the formalists, an insurer that drafts a clear form should be entitled to rely on that form in setting rates without worrying that a court will disregard the finely tuned, clear language.... The other contestants in the battle for the soul of contract law are the functionalists, who are sometimes also labeled as the progressives, the realists, or the post-classicists. The champions of this side are Professor Corbin and the RESTATEMENT (SECOND) OF CONTRACTS (1981). The functionalists care less about

Not entirely. Although most courts still require a dominant or substantial causal nexus to exist between a covered risk and the resulting loss, an important underlying public policy rationale for automobile liability insurance is to secure compensation for the third-party victims of highway accidents as well as provide liability coverage for insured policyholders;[163] and this underlying public policy factor explains in large part why many courts today in automobile insurance coverage disputes often apply a minimal or sufficient causal nexus test rather than a more substantial causal nexus test.

IV. CONCLUSION

Legal causation requirements, in both tort and insurance law practice, are among the most pervasive yet most elusive and most misunderstood of all legal concepts in Anglo-American law. Tort and insurance law practitioners, however, must deal with these legal causation issues on a daily basis, and there are some general guidelines for understanding and negotiating this often-misunderstood conceptual quagmire of pleading and proving legal causation requirements.

In a tort law context, "but for" causation and proximate causation both are required elements for any intentional tort, strict liability in tort, or negligence cause of action, especially in cases involving issues of multiple concurrent causation. Proximate (or legal) causation does not really involve causation at all but instead is a policy decision made by the courts to limit liability based upon underlying public policy grounds. However, the proximate cause rationale for a limitation of liability based upon underlying public policy reasons was not created in a vacuum, and most courts today in determining whether a defendant's act, or omission to act, was too remote or did in fact constitute the proximate cause of a plaintiff's injuries still justify their decisions based upon concepts of foreseeability, including (1) the foreseeability of the plaintiff or a rescuer; (2) the foreseeability of harm in a direct causal chain of events, including a particular manner of harm versus general type of harm argument and whether or not the causal

the text of contracts, believing it to be most useful as an articulation of the objective manifestations of the contracting parties and as a means to understanding their intentions and expectations.... Text does not have inherent meaning, but text means what the drafter or speaker knows or should know the other side will understand those words to mean in context.... Where a form is standardized, the functionalists substitute objectively reasonable expectations for whatever the particular recipient of the form understood, given that the recipient has less reason to know what the drafter means, while the drafter has insights into what the ordinary, reasonable recipient of the form is likely to understand.

Id.

163. *See generally* KEETON & WIDISS, *supra* note 131, at 385–86.

sequence of events was highly extraordinary and therefore unforeseeable; (3) the foreseeability and unforeseeability of intervening causes; and (4) the foreseeability or unforeseeability of the extent of harm.

Because most analysis and research in the field of legal causation primarily has occurred in the field of tort law and because insurance law is somewhat of a hybrid between tort and contract law, a number of American courts have applied classic tort causation principles to insurance coverage disputes as well. Beginning with Benjamin Cardozo's landmark decision in *Bird*, however, a growing number of American courts have begun to realize that although most insurance cases still require direct "but for" causation similar to tort law, insurance proximate cause issues are not solely based on a foreseeability of harm but are also based on the reasonable expectations of the contracting parties.

Accordingly, over the past nine decades, American courts and juries have struggled mightily to analyze and resolve various insurance causation issues from a number of different perspectives. Some courts determine coverage by applying an immediate cause rationale, while other courts employ an efficient proximate cause chain of events doctrine similar to tort law or utilize a hybrid approach combining both of these rules. The courts likewise have employed no less than three different insurance law approaches to address multiple concurrent causation issues, and they have disagreed on whether an efficient proximate cause approach requires a substantial causal nexus or only a sufficient causal nexus.

But regardless of which particular standards a practitioner or a court may employ in attempting to resolve specific tort or insurance causation issues—and there are a number of divergent approaches—these interpretive rules still must be sufficiently malleable and flexible when applied to differing circumstances and conditions to protect the rights of injured plaintiffs in tort cases and the reasonable expectations of the contracting parties in insurance cases, however these legal causation concepts are ultimately determined by a court or by a trier of fact.

In both tort law and insurance law, then, "common sense and reasonable judgment"; a "rough sense of justice"; and "logic, common sense, and public policy" ultimately will resolve most of these legal causation issues.