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Review of "Rationale of Proximate Cause," By Leon Green

William G. Hale
Washington University School of Law

RATIONALE OF PROXIMATE CAUSE. By *Leon Green.* Kansas City: Vernon Law Book Company, 1927. Pp. viii, 216.

The main thesis of Mr. Green's interesting book is this: Many problems that have been nominally dealt with under the general appellation "Proximate Cause" and allocated to the jury with varying degrees of liberality are in reality not problems of causation at all but problems of law to be settled by the court, not the jury, in determining the scope of the rule of law which the plaintiff is invoking. "An interest having been recognized as worthy of protection, how much protection shall it be given? Against what risks shall it be protected? What are the limits of the rule invoked? Does the rule afford protection against the hazard which the plaintiff's interest has encountered? This is the exact inquiry." (P. 13.)

Mr. Green does not assume that the decision in each particular case is made easy by this approach, but only that the rational mode of reaching decisions is set up. He does not claim to have cut the Gordian knot of proximate cause, but only to have designated the tools which when properly handled will enable the courts with greater skill to attain that happy consummation. "The hazards to which any interest is subjected are so numerous, and the reach of any rule which the plaintiff may invoke in its vindication is so poorly defined, and there are so few external guides to tell a court whether a particular hazard is within the range of the rule invoked, that the problem may well prove bewildering. Nevertheless, the court must determine it in every case, consciously or otherwise. The judicial power cannot function in any other way. It is a problem solely for the judge and the jury has no part to play in its determination. It is at this point that the law-making function of the courts is most frequently employed. It is here that the great bulk of what we call law—the aggregate of legal rules with their limitations—is built up. Just as the courts extend the law in the recognition of interests which have been thought to be worthy of the law's protection, so in defining the limits of that protection they exercise an equally expansive power. And the process is applicable to interests recognized by legislative authority in exactly the same manner." (P. 12.)

Two illustrations, taken at random from the numerous ones in the book, will make the nature of the problem, as the author conceives it, clearer. "An act requiring vessels carrying live stock to be fitted out with pens of small dimensions to prevent a spread of infectious disease was not complied with by the defendant and during the voyage the plaintiff's sheep were swept overboard by a rough sea. Had the vessel been provided with pens such loss would not have been sustained. The plaintiff relied for recovery on the terms of the act. Kelly, C. B., said: 'But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on the way to this country; * * * the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.' Pigott, B.: 'Admit there has been a breach of duty; admit there has been a consequent injury; still the legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose.'" (P. 25.)

"The same process is inevitable in suits based upon the rules of the common law. The fact that the rule is statutory or of common law origin can make no difference.

"A plaintiff was hurt by reason of a defective wheel of an automobile in which he was riding. He purchased the car from a retail dealer, but he sued

the manufacturer with whom he had no contract relation and alleged its negligence in failing to inspect the car properly. The question was whether the plaintiff's right to be free from bodily harm was within the protection of the rule of law here invoked, *i.e.,* the duty on the part of the manufacturer to inspect. It was decided in favor of the plaintiff. The whole line of cases involving the liability of a manufacturer to third persons presents the same problem." (P. 28.)

"In *Scheffer v. Railway,* the plaintiff alleged that as a result of a wreck caused by the negligent collision of the defendant's trains, Scheffer, deceased, was so injured in body and mind that he took his own life. The court sustained a demurrer to the declaration, holding the defendant's negligence too remote. Surely causal connection was not wanting in the allegations. Had imbecility or tuberculosis resulted from the injuries received, the court would not have reached such a conclusion. If the deceased, while in a delirium as a result of his injuries, had torn off his bandages and infected his wounds so that blood poisoning had set in, no such conclusion would have been reached. The meaning of the decision is merely that this character of result is not within the protection of the rule of law relied on by the plaintiff. Suicide as a result of a deranged mental condition is not a risk which a defendant incurs by negligently hurting another. The question is not one of causal connection, but one of fixing the boundaries of a legal rule, and it is doubtful that such are correctly marked out in this instance. There is no such holding under the Workmen's Compensation Act." (P. 37.)

The judicial technique necessitated by this method of handling proximate cause is full of obvious difficulties, but they are perhaps no greater than the difficulties involved in any process of making or declaring law. With the author's consent we here set forth brief excerpts from some correspondence relative to this particular item. The writer of this review placed the matter before Mr. Green in the following form: "My difficulty centers in the main around your thesis relative to hazard. If you will be good enough to put on your judicial robes and mount the bench, I shall ask you as judge in several cases to give me your judicial mental processes.

"1. I call your attention to the Parry case on page 95 of your book. Will your honor please explain why or why not the final injury was such a hazard as fell or did not fall within the scope of the rule of law which obligated defendant to take care of deceased?

"2. Please analyze *Gilman v. Noyes,* also on page 95, with reference to the same factor?"

Mr. Green's reply to these inquiries is as follows: "In the Parry case I am trying to say about this: D undertook to look after deceased when the latter needed attention, therefore it owed him, as we say, the duty of reasonable care. The defendant violated that duty by letting deceased get away (that is, it was reasonably foreseeable that deceased would probably get hurt if let go, hence the duty to take care; failing in this, there was negligence); deceased was hurt and clearly D's wrongdoing was one of the material factors contributing to the result. Though all of these three might be jury questions, they are easy ones; D was negligent, deceased was killed, as a result of such negligence. But to my mind no one of these suggests the real difficulty of the case. These three factors, negligence, damage and causal relation, are conclusive only when it is first assumed that the risk or hazard or injury as it actually took place, is a risk, etc., which the rule D violated is designed to give protection against. Was the hazard of being run over by a train five miles out, one within the protection given by the rule D violated? This was a question calling for the bounding of the limits of protection given deceased under the rule. It was for the judge, for if such a hazard was too far out of line, beyond the scope of the protection af-

forded by the rule invoked, then that would end the case. On the other hand, if not too far out of line, then the questions of negligence, causal relation, damages, were still to be solved.

"Now how was the court to know whether the hazard was protected against? Here as I have repeatedly said, no formula can be laid down. In this case my own sense of fairness as to what the rule was designed to protect against is satisfied by holding the defendant under a liability. I think violent physical injury was clearly one of the things against which protection should be given under this rule. But if deceased had wandered off and into a pest-house five miles out and had contracted small-pox, had he been taken up as a vagrant and put in jail, had stolen bananas and gotten arrested, had falsely imprisoned some one and been sued for damages, I would likely be just as certain the other way. Yet in each of these cases the defendant would be negligent, there would be causal relation and there would be damages. I would say that the rule was not designed to protect against such hazards, though some other judge might differ with me on close cases. But this cannot be helped, and conflicting decisions on such points cannot be classed as right and wrong; the difference is a matter of judgment.

"2. I would deal with the bear case *(Gilman v. Noyes)* the same way. Here, negligence, causal relation and damages were just about as clear as could be. But when defendant left the bars down and violated a rule of law (the rule of law that demands reasonable care) what hazards or risks were imposed upon him? Was the risk that bears would get the sheep a risk that he took? I suggest that this is a question of bounding or defining the protection that the particular rule of law afforded P. It was for the court to say whether this risk fell within or without the rule. (Incidentally Ladd's opinion in that case is the clearest piece of analysis that I have found to support my suggestion at this point.)

"Now, you ask again, how was the court to know whether this fell within the rule or not? I will name just some of the factors: (1) The probability of bears being an agency of destruction for wandering sheep in that neighborhood is one. (2) Whether a person going on another's land and leaving open his gaps, etc., should not take the risk whatever the hazard the landowner's straying stock may encounter (a very strong factor). (3) Whether bears, inasmuch as they can come into pastures and get the sheep, as well as get them when the sheep stray, do not constitute such a small risk as not to be taken into account under any circumstances (note that this is not the same thing as probability). (4) Whether the straying of domestic sheep to such distances from their haunts is not such a small risk as not to be taken into account, and as in (3) a risk to be borne where it happens to fall. (There may be others and doubtless are, but these indicate some of the considerations that as a judge in passing on the applicability of a rule of law I should take into account. In this case (2) is so strong with me personally that I should likely give it very great weight.)"

Under Mr. Green's analysis, the questions which go to the jury, except in those cases where the answer is so obvious that the judge should declare it, are:

1. In negligence cases, was the defendant negligent?

2. In any case, was the defendant's wrongful act, or omission, a cause in fact of the injury for which the plaintiff is seeking to recover?

3. Was the defendant's wrongful act, or omission, as compared with other causative elements, a substantial factor in producing the harm in question to the plaintiff?

But as he points out, the third item usually fades into relative insignificance after the court has discharged its function by determining whether the hazard in question is one which the rule protects against.

We do not feel disposed at this time to attempt a definite appraisal of the value of Mr. Green's contribution. We readily concede that his views are stim-

ulating. Both Mr. Green's book and the articles by Professor Joseph W. Bingham in 9 *Columbia Law Review,* to which Mr. Green pays a well-deserved tribute, will bear further study. For the present we are content to leave them on the knees of the gods.

Finally, on Mr. Green's behalf, we note the following corrections, the need of which our correspondence brought to light: on page 154, in the first sentence of the last paragraph, the word "defendant's" should be substituted for the word "claimant's"; and on page 156, in the third line, the letter "D" should be substituted for the letter "A."

WILLIAM G. HALE.

Washington University School of Law.

HANDBOOK OF FEDERAL JURISDICTION & PROCEDURE. By *Armistead M. Dobie.* St. Paul: West Publishing Co., 1928. Price $4.50.

This publication is the latest contribution to this particular field of jurisprudence, and it merits the highest commendation as a textbook on that subject, which now occupies a permanent part of the curriculum of every well conducted Law School. Professor Dobie, who is also the author of a work on Bailments, has for many years occupied the chair of Federal Jurisdiction and Procedure in the University of Virginia, and his present work evidences both his experience as a teacher and his recognition of the necessity for a modern, up-to-date textbook on this important subject.

The Act of February 13, 1925, effected a far-reaching change in the prior federal appellate jurisdiction and rendered practically useless, both to lecturer and practitioner, all former textbooks on this phase of the subject. The Wizner case (203 U. S. 449), until finally expressly overruled by the decisions of the U. S. Supreme Court in *Lee v. Chesapeake & Ohio Ry. Co.,* 260 U. S. 653 and *General Investment Co. v. Lake Shore & M. S. R. Co.,* 260 U. S. 261, upset the prior long-established principles governing removal proceedings and left the law in a "terrible muddle." The Judicial Code of 1911 has also since been in part repealed and amended in divers jurisdictional aspects, and Prof. Dobie is to be congratulated upon having a textbook which brings his subject down to date, states the law as it exists today, and which should receive the most favorable consideration by the student, the bench and the bar. In short, it is the last word on the subject.

The book itself, which is of the well known Hornbook Series, consists of twelve chapters, the first of which deals with the federal judicial system as a whole, including under appropriate black letter sub-titles, the organization of the several federal tribunals, their respective personnel, limitations as to jurisdiction, and a discussion of the concurrent and exclusive jurisdiction of the Federal Courts under the Judicial Code and the new United States Code.

Then follow Criminal Law & Procedure (Chapter 2); the Original Jurisdiction of the District Courts (Chapter 3); Removals (Chapter 4); Venue (Chapter 5); Original Jurisdiction of Supreme Court (Chapter 6); Rule of Decision at Law (Chapter 7); The Conformity Act (Chapter 8); Equity Jurisdiction & Procedure (Chapter 9); Appellate Jurisdiction of Circuit Court of Appeals (Chapter 10); Appellate Jurisdiction of Supreme Court (Chapter 11); and Appellate Procedure Generally (Chapter 12). The Appendix includes the Equity Rules, the Judicial Code, and the Supreme Court Rules, which are set out *in haec verba.*

The citations are numerous, well chosen, and with particular reference to more recent decisions, many of which may be found in volume 275 of the Supreme Court reports. Frequent notes on said decisions further elucidate and explain the text. The chapters on Removals, Venue, Rule of Decision at Law, Conformity Act, Equity Jurisdiction & Procedure, and Appellate Procedure, deserve