

PROXIMATE CAUSE IN NEGLIGENCE—A RETREAT FROM “RATIONALIZATION”

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THIS article is not an attempt either to state the alleged principles of proximate cause or to further in any way the illusion that there is a generally recognized and understood set of such principles. It is, rather, an attempt to outline the considerations entertained by courts in determining the extension of liability for negligence and to explore critically typical judicial techniques employed in such a process. Although the suppositions in the first part of the article are not strictly accurate in the light of history, they adequately suggest early considerations of policy involved in the extension or restriction of liability for negligence. Since the discussion is concerned primarily with negligence litigation, I have included a brief account of the negligence issue as a background for the balance of the article.

I

Suppose a society in which the wise men governing it adopt the general principle that all who cause harm to others shall be made to answer for it. This working principle they proceed to enforce, whether the harm is intended or not, and judgments are given requiring compensation for the harm caused. No special consideration, however, is given to the fault of the defendant, since it is felt that as between him who causes the harm and him who suffers it, the former ought to stand the loss rather than the latter. The courts are soon confronted, however, with a type of case in which they believe that the harm complained of, although certainly a causal consequence of the defendant's conduct, is too attenuated, too far removed from the conduct of the defendant, to make imposition of liability politic. They can be imagined saying: "The plaintiff asks too much. Surely the fathers did not intend us to go so far. Literal application of the principle of liability adopted above would place too great a burden on the everyday conduct of people and, above all, would seriously affect business enterprise. We must qualify this principle of causation."

Presently it is observed that plaintiffs are losing cases in spite of a clear showing that the defendant's conduct contributed to their damage in the

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sense that "but for" this conduct, they would have suffered no harm. But the courts are not anxious to reveal their perplexity or to indicate why they are hedging on the original principle of liability. They proceed to devise a rule which they believe will produce more satisfactory results and justify it on considerations of convenience, establishing the impression, however, that this qualifying rule is, in the nature of things, implicit in the original principle of liability itself.

This hedging device is the pronouncement that the fathers did not mean all causal consequences of a defendant's conduct to be actionable. They meant, rather, only those consequences which were fairly direct or immediate, since it is apparent that courts cannot pursue cause and effect indefinitely. They would never get anything done if they did! The courts, therefore, enunciate the qualification of the original principle that the law will look at only the "proximate" and not the "remote" consequences of the defendant's conduct.¹ This is sufficiently broad to allow great latitude for interpretation. The courts, indeed, soon discover that this qualifying principle is effective not only in deciding causation problems but also in concealing grave and delicate issues of policy as well. Before long, the courts are using this formula of proximate cause and consequence to explain decisions conventionally thought of as involving the duty issue. It is noteworthy, however, that the courts always retain the original principle of causation in its full vigor when it appears that the defendant intended the harm which ensued.²

In such a society as we have supposed, a considerable space in the law books becomes devoted to the principles of proximate cause. The courts have handled hundreds of nice problems of policy in cases involving all sorts of ordinary and weird fact situations; but the material with which they have dealt is so heterogeneous and internally unrelated that they have not been able to devise any general propositions which are helpful in predicting results in future cases and at the same time retain some semblance of what has conventionally become to be thought of as law and legal principles. Indeed, so many odd decisions on matters of social policy of all sorts have been disposed of in the name of proximate cause, that the judges become unable even to state generally what the issue of proximate cause is, much less to state the rules of proximate cause as a guide to the

¹ "In jure non remota causa sed proxima spectatur. It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bacon, Maxims I.

² But consideration of "proximate cause" except in negligence cases is beyond the scope of this discussion.

future. And the matter is not improved by the dozens of attempts by legal scholars, most of them like myself, writing from the side-lines, to state the issue clearly and to propound the answers succinctly.³

During this development, let us suppose, the courts became impressed with the idea that social movement and enterprise and the ownership of land would be less stifled and onerous if liability for harm caused thereby were made to depend not on mere causation but on the manner of such conduct and maintenance of ownership. The notion emerges that a person should not be held liable for the consequences of his conduct unless he is found to have been what the courts call negligent. Close on the heels of this development follows another hedging device to the effect that the defendant cannot be held accountable for harm he causes unless he was under a duty to refrain from the alleged negligence causing it. This gives the court a tremendous control of litigation, since it can always interpret any situation in terms of duty. In stereotyped and highly repetitive fact situations, such as traffic on highways, where the duty to take care is always conceded, everyone will become so habituated to the requirement of care that the duty to refrain from negligence will be taken for granted and the duty *issue*, as such, will disappear. Likewise, where recovery is always denied in certain fact situations, such as actions by trespassers hurt by the condition of land, everyone will accept the position without question that there is no duty to refrain from the negligence alleged. The emphasis then will be placed on the inquiry before the court whether or not particular fact situations fall within or without the accepted categories of duty. Courts will find considerable latitude by interpretation to expand or contract either category in response to what it considers social need to be and, moreover, will be able to dispose of nice issues of policy in the name of duty just as they have been doing under the issue of proximate cause.⁴

³ *E.g.*, Smith, *Legal Cause in Actions of Tort*, 25 *Harv. L. Rev.* 103, 223, 303 (1911-12), reprinted in *Selected Essays on the Law of Torts*, 649 *et seq.* (1924); Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 47 *Am. L. Reg.* (40 N.S.) 79, 48 (1901), reprinted in *Studies in Torts* 1 (1926); Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 *Col. L. Rev.* 16, 136 (1909); Edgerton, *Legal Cause*, 72 *U. of Pa. L. Rev.* 211, 343 (1924); Beale, *The Proximate Consequences of an Act*, 33 *Harv. L. Rev.* 633 (1920); Green, *Rationale of Proximate Cause* (1927); McLaughlin, *Proximate Cause*, 39 *Harv. L. Rev.* 149 (1925); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 *Calif. L. Rev.* 229, 396, and 471 (1932).

⁴ *E.g.*, Cardozo, J., in *McPherson v. Buick Co.*, 217 *N.Y.* 382, 110 *N.E.* 1050 (1916). See also Cardozo, J., in *Ultramares Corp. v. Touche*, 255 *N.Y.* 170, 174 *N.E.* 441 (1931). In this latter case the defendant accountant negligently prepared a balance sheet for S company which S used to obtain credit from plaintiff. The court achieved protection from liability for

Naturally, the courts adapt to the negligence concept of liability these techniques employed for the purpose of imposing or denying recovery. Henceforth a person can not be held liable unless he is negligent, unless he is under a duty to refrain from negligence or to exercise due care under the circumstances in litigation, and unless his negligence is the proximate cause of the plaintiff's damage or, conversely, the damage is the proximate consequence of the negligence.

II

Negligence soon became a dominant concept in the law, the meaning and content of which everyone who had anything to do with law assumed he understood. When lawyers talked about negligence, they took it for granted that they were all talking about the same thing. But this was not so clear, since some of them regarded negligence as involving fault and a sort of moral shortcoming, whereas many of them defined it merely as careless conduct or lack of care under the circumstances or conduct which diverged from the standards of care observed by reasonable and prudent men. Some others have thought that negligence is rather a tactical counter in a process of litigation and prefer to think of it in light of what happens in a law suit before a judge and jury. They consider it from the judges point of view as evidence upon which he permits the jury, under the negligence issue, to impose liability, and from the jury's point of view merely as evidence justifying the liability. This attitude is prompted, no doubt, by the many instances of cases submitted to juries in which the evidence indicates that defendant had behaved no differently from most of his fellow-men but that someone had nevertheless been hurt. But even under this view of negligence the courts have some standard of reasonable conduct which is, presumably, the manner in which most people behave under similar circumstances. Occasionally the court itself draws the final inference of negligence *vel non*. When it does this, it is evaluating the defendant's conduct to determine whether or not it justifies the imposition of liability. When the court lets the case go to the jury, it permits the

negligence by concluding that the duty of care in making verbal or written representations for another to use with third parties was confined to those situations where the careless misrepresentation would be used to affect a definite or limited class of people. It said that only "fraudulent" misrepresentations would be actionable where the class to be affected was indefinite in number; but the court took a rather large view of what might be considered "fraud." Compare the recent case of *State Street Trust Co. v. Ernst*, 278 N.Y. 104, 15 N.E. (2d) 416 (1938), noted in 6 *Univ. Chi. L. Rev.* 127, in which the same court (two justices dissenting) considered a serious error in judgment on the part of an accountant in a similar case to be "gross negligence" and thus tantamount to "fraud" within the meaning of that word in the *Ultra-mares* case.

jury to do the evaluating.⁵ Even this is not all, since the court may if it wishes to in appropriate cases submit the issue of "gross negligence" to the jury when consideration of that issue becomes a vital factor in establishing the defendant's liability.⁶

It became the vogue to speak of the negligence issue as a "mixed issue of law and fact" for the court and jury.⁷ But this is very confusing terminology. It implies, what is frequently asserted, that negligence is an issue of law and/or an issue of fact. The arguments to support the view that it is an issue of law are (1) that courts sometimes make the inference of negligence *vel non* and since courts pass on issues of law, therefore negligence is an issue of law, and (2) that when a negligence case is submitted to the jury, it is up to the jury to decide whether liability shall be imposed or not, and imposition of liability is a matter of law. Arguments to support the view that it is an issue of fact are (1) that a defendant either is or is not negligent and whether he is or not is a matter of fact, and (2) that this issue is ordinarily submitted for final disposition to a jury, and the jury being a fact-finding body, what it passes on are issues of fact.

Actually it does not make a bit of difference whether we call the negligence issue one of law or of fact or neither. What happens to the negligence issue before a court and jury is what matters. The court always scrutinizes the evidence to determine whether or not it is safe to permit a jury of laymen to hold a defendant liable for what he did or failed to do. As many people frequently describe this step, the court determines from the evidence whether or not a jury of laymen may reasonably draw the inference of negligence or no negligence from the evidence submitted. If the court believes that the evidence reasonably justifies the inference of liability—that there is some item of evidence on which liability may justifiably be hung by a group of laymen—it submits the case to the jury on the negligence issue. If it feels otherwise, it directs a verdict for the defendant. If the court is sitting without a jury it draws the final inference itself. But whoever draws it, it seems plain that this is an evaluating process and in its nature is not much different from judging a beauty

⁵ On the nature of negligence see Holmes, *The Common Law*, 108 *et seq.* (1881), and the admirable essays of Seavey, *Negligence, Subjective or Objective*, 41 *Harv. L. Rev.* 1 (1927); Edgerton, *Negligence, Inadvertence and Indifference: The Relation of Mental States to Negligence*, 39 *Harv. L. Rev.* 849 (1926).

⁶ *Cf.*, *e.g.*, *State Street Bank v. Ernst*, 278 N.Y. 104, 15 N.E. (2d) 416 (1938), discussed in note 4 *supra*.

⁷ As to this phrase, see Bohlen's excellent treatment in *Mixed Questions of Law and Fact*, 72 *U. of Pa. L. Rev.* 111 (1924), reprinted in *Studies in Torts* 601 (1926).

contest or a competition among musicians. The conclusion, whatever it be, is not a fact conclusion; it is a value judgment.

A significant feature of the administration of negligence litigation is the traditional judicial distrust of juries. Courts exercise a very strong control over the well-recognized vagaries of the jury in deciding whether or not cases should be submitted to it. They have to exercise this control, because if the jury were always permitted to pass on the negligence issue, there is no telling what factors might move it to bring in a verdict for the plaintiff, in spite of elaborate instructions to guide it. Courts know very well that juries are inclined to be sympathetic to plaintiffs and less so to defendants and that laymen do not judge cases from a broad, general view of policy but rather from the apparent exigencies of the particular case. When, however, a court believes that there is enough in the evidence to support the imposition of liability, it submits the case to the jury knowing full well that its verdict may be impelled not by a consideration of the factors which the judge exhorts it to depend on but by entirely extra-legal and prejudicial items. Under the accepted system, it is proper for the jury to use its own judgment as long as it has received correct instructions and returns its verdict in the formally approved manner. A better control could be exercised by requiring special verdicts or findings from the jury on particular questions. Its response to questions on the negligence issue would still be speculative; but at least it would be difficult for the jury to take the bit in its teeth and run away in the plaintiff's favor regardless of the evidence.

III

Assuming an appreciation of the so-called negligence issue, it becomes necessary to examine in some detail the other devices mentioned above which the courts have associated with liability for negligence and which they employ to control litigation before a court and jury. These devices we may label, for convenience, the issues of "duty" and of "proximate cause." It was suggested that to some extent they may be used interchangeably by the courts. The duty issue is admittedly a matter for the court alone to pass on. When it decides to submit a case to the jury, it has decided this issue in favor of the plaintiff. Thus, in an action by a fireman against a landowner for harm suffered from an alleged careless condition of defendant's land while he was on it in pursuance of his calling, most courts would direct a verdict immediately for the defendant before the submission of evidence. They would say that admitting plaintiff's contentions, he cannot recover because the landowner was under no "duty of

care" toward a "licensee" entering his premises, to keep the land in careful condition. On this matter the court does not want the jury's opinion. This is a matter of general policy or, if you will, of "law," to be decided by the court alone. If a court decides to take a different view of this matter, it expands the field of duty and lets the fireman get to the jury on the issues of negligence and cause in fact.⁸ Or take another well-known situation. The courts have decided that one who is hurt by a defect in a manufactured product may not get to the jury in a negligence action against the manufacturer unless he can show privity of contract, i.e., that he bought the article directly from the defendant rather than from some intermediate distributor. They say that no duty of care exists in the absence of this privity of contract. In one of the most famous decisions asserting this point of view, the court gilded the lily by pointing out that unless privity of contract were present, the negligence, if any, was not the "proximate cause" of the plaintiff's harm.⁹ This observation was suggested by the statement that it is not foreseeable to a manufacturer that anyone not in privity of contract will be endangered. The inanity of this statement was stressed in the leading decision expanding the duty of the manufacturer.¹⁰ Yet the case remains as an example of the use of both devices by the court as a means of keeping the plaintiff from the jury.

The most important part of this discussion, however, is what the courts have done with the other control device, the so-called issue of proximate cause. Perhaps a more accurate label is the issue of extension of liability for negligence. As might be expected with an issue into which so many considerations of policy as well as some intricate questions of cause in fact have been crowded, courts in various jurisdictions seem to differ very much from each other in their manner of talking about and deciding cases under this issue.¹¹ For purposes of convenience only, I am going to label these apparently different views concerning the same issue. Eventually, I hope to show that the issue of proximate cause, at least as I regard the content of that term, is not at all the same issue for court and jury. Before discussing the transmission of the so-called jury issue of proximate cause to the jury, I am going to discuss the issue of proximate cause with which the court alone is concerned.

⁸ *Meiers v. Koch Brewery*, 229 N.Y. 10, 127 N.E. 491 (1920).

⁹ *Huset v. Case Threshing Machine Co.*, 120 Fed. 865 (C.C.A. 8th 1903).

¹⁰ *McPherson v. Buick Co.*, 217 N.Y. 382, 110 N.E. 1050 (1916).

¹¹ See the counsel of despair in the opinion of Wheeler, C. J., in *Mahoney v. Beatman*, 110 Conn. 184, 147 Atl. 762 (1929). But Heard, J., in *Illinois Central Ry. v. Oswald*, 338 Ill. 270, 170 N.E. 247 (1930) does not seem to think there is much doubt or confusion.

An appellate court in any jurisdiction has to decide how far-reaching it is going to make imposition of liability for negligence. Presumably it will subscribe to the common law on this subject, which is that a defendant is liable for the proximate consequences of his negligence. The court then has to decide what it is going to read into the words "proximate consequences." There is reason to believe, for instance, that the English courts have finally adopted the view that a defendant should be held liable for all harm actually caused by his negligence.¹² Their approach is alleged to be as follows: The evidence of the defendant's conduct is scrutinized by the court to see whether the inference of negligence of some or any sort might be drawn, and in making this determination the court considers whether or not harm of any sort might reasonably have been foreseeable; but if there is a justifiable basis in the evidence for the inference of negligence and of causal connection in fact, the case will go to the jury even if the ultimate harm complained of or the hazard from which it arose was entirely unforeseeable. This I shall call the English view. It is supposed to have been established in the cases of *Smith v. R. R.*,¹³ *In re Polemis*¹⁴ and *Hambrook v. Stokes*.¹⁵ Thus in the *Polemis* case, the defendant's servant dropped a heavy plank in the hold of plaintiff's ship. The plank caused a spark in landing, which ignited benzine vapor and several tins of benzine in the hold, the entire ship being destroyed by fire. Arbitrators to whom the case was submitted for a report found that dropping the plank was negligent in that some harm to the ship, workmen and cargo was foreseeable but that the spark and fire were not foreseeable consequences. The court nevertheless imposed liability.¹⁶

At the other extreme is what I shall call for lack of a better name the Pennsylvania view,¹⁷ albeit that court has probably retreated considerably from it in late years.¹⁸ This view is supposed to be that even if the

¹² There is some question whether or not the English courts will require that there must have been negligence of some sort toward some interest of the plaintiff. A hint of this appears in the opinion of Atkin, L. J., in *Hambrook v. Stokes*, [1925] 1 K. B. 141. See my discussion, p. 54 *infra*.

¹³ L. R. 5 C. P. 98 (1870); L. R. 6 C. P. 14 (1870).

¹⁴ [1921] 3 K. B. 560.

¹⁵ [1925] 1 K. B. 141.

¹⁶ It should be noted that this suit arose out of an arbitration concerning defendant's liability under a charter-party which provided that the defendant would not be responsible for damage to the ship by fire.

¹⁷ The "natural and probable consequence" rule, as it is sometimes called.

¹⁸ Compare *Hoag v. Lake Shore R. R.*, 85 Pa. 293 (1877) with *Pittsburgh F. & I. Co. v. Dravo Contracting Co.*, 272 Pa. 118, 116 Atl. 147 (1922) and with *Wood v. Pennsylvania R. R.* 177 Pa. 306, 35 Atl. 699 (1896), *Mellon v. Lehigh Valley R. R.*, 282 Pa. 39, 127 Atl. 444 (1925). See also *New York Eskimo Pie Corp. v. Rataj*, 73 F. (2d) 184 (C.C.A. 3d 1934).

defendant was negligent in some respects and even if that negligence was in fact causally contributive to the harm complained of, the court will nevertheless direct a verdict for the defendant if in its opinion the eventuality complained of was not a foreseeable incident of the defendant's negligent conduct, *i.e.*, was a rather weird and improbable occurrence. Leading repositories of this view are *Hoag v. Lake Shore R. R.*¹⁹ and *Wood v. Pennsylvania R. R.*²⁰ In the former case an engineer carelessly ran a train of tank cars loaded with oil into a landslide, derailing the train. Upset oil ignited from the coals of the engine and, flowing into an adjacent brook, was carried down stream several hundred yards where it ignited overhanging grass in plaintiff's field from which, in turn, the fire spread to and destroyed a building. In the second case an engineer of a through train approached a crossing at sixty miles per hour without giving any warning signals and struck a woman, the force hurling her body through the air so that it hit the plaintiff while he stood on a nearby station platform. The Pennsylvania court held that each of these cases should have been decided for the defendant on a directed verdict.

An intermediate view, which I shall somewhat guardedly call the Cardozo view for lack of a better name, requires that for liability in negligence the general hazard or danger which brings about the harm complained of must have been reasonably foreseeable, although the way in which it manifested itself in the occurrence of harm to the plaintiff might have been quite weird and improbable. A leading example of this view is the famous *Palsgraf* case.²¹ In that case the evidence indicated that defendant's guard and conductor so carelessly pushed a prospective passenger onto a moving train as to endanger the passenger's interest in his own welfare and in a package he carried. At any rate, the package was dislodged from his arm and fell on the tracks. Since it happened to contain fireworks, it blew up and the concussion broke a cracked scale at the other end of the platform so that part of it fell on Mrs. Palsgraf, the plaintiff, who was standing beside it.²² She was far removed from the scene of foreseeable danger, by thirty or forty feet, and since there was obviously no reason why defendant's servants should have expected the

¹⁹ 85 Pa. 293 (1877).

²⁰ 177 Pa. 306, 35 Atl. 699 (1896).

²¹ *Palsgraf v. The Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

²² One cannot help wondering what would have happened had Mrs. Palsgraf stressed the weakened condition of the scales as the negligence upon which she based her action. Perhaps she might have shown that it was a constant danger to waiting passengers like herself, in view of the many loud noises and vibrations normal in railroading that might have furnished a sufficient shock to make the scales fall without the added effect of the explosion which actually occurred.

package to contain explosives, they could not foresee that a hazard might be created that would take effect at such a distance away. The trial court sent the case to the jury and the Appellate Division affirmed a judgment for the plaintiff.²³ But the Court of Appeals in a four to three decision reversed the judgment and said that a verdict should have been directed for the defendant railroad.

Although the facts in this case and the social situation behind them are quite different, it involves much the same general sort of problem as the carrier cases in which a railroad negligently fails to forward goods on time and they are destroyed by some entirely unforeseeable holocaust such as a flood or fire. The foreseeable damage which renders the conduct negligent is the probability of commercial loss or other inconvenience to the shipper or consignee from the delay. The damage is a result not of this foreseeable hazard of commercial inconvenience but of the unforeseeable hazard. And yet, but for the negligent delay, the harm would never have occurred because the goods would not have been there to be destroyed. Some courts have imposed liability here; others have denied it. Decisions both ways are rationalized under the concept of proximate cause.²⁴

It seems clear that Cardozo writing the majority opinion in the *Palsgraf* case took his cue from decisions of this general sort denying liability. If the defendant's servants had known, or from the evidence had had reason to know, what was in the package, negligence with respect to the hazard achieving the damage complained of would probably have been sufficiently apparent to permit submission of the case to the jury. Cardozo did not say this; he talked of negligence as a concept of relationship and said that the case could not go to the jury since the evidence in no way indicated that the defendant's servants had been negligent toward the plaintiff. He said that if the defendant's servants had known about the explosive in the package, then their conduct with reference to it would have related their negligence to all people within the probable area of the foreseeable explosion including the plaintiff. He added that the issue of proximate causation was foreign to the case, and many readers have therefore supposed that the issue in the case was different from that commonly travelling under that name. These readers say that Cardozo was simply declaring that negligence is a term of relationship—that you “can't have negligence in the air, so to speak”—and a defendant cannot be held liable unless it appears that he was negligent toward or in relation to the

²³ 222 App. Div. 166, 225 N.Y. Supp. 412 (1927).

²⁴ Compare *Bibb Broom Corn Co. v. Atcheson, T. & S. Ry.*, 94 Minn. 269, 102 N.W. 709 (1905) and *Seaboard Airline Ry. v. Mullen*, 70 Fla. 450, 70 So. 467 (1915).

plaintiff. This, of course, is just a quarrel over words. Naturally it may be assumed as axiomatic that negligence is a term of relationship. There was ample evidence in the *Palsgraf* case to show that the defendant's servants were negligent, *i.e.*, to warrant a jury's inference to that effect.²⁵ But this negligence was toward the interests of the prospective passenger who ran for the train and not toward people as far away as the plaintiff. Therefore, if we conclude that Cardozo's view is that negligence is not actionable in spite of causation in fact (1) unless the hazard resulting in the harm complained of is reasonably foreseeable, or (2) unless it (the negligence) is relative to the plaintiff, we are concluding substantially the same thing under different sets of words.²⁶

Andrews, writing the dissent in the *Palsgraf* case, thought it was properly submitted to the jury, since he felt that there was evidence of some negligence toward someone, *i.e.*, the prospective passenger, which apparently in fact causally contributed to the harm. His view of the extension of liability for negligence is approximately the same as the English view, except that he thinks the line should be drawn somewhere in some cases. He does not tell us where it is to be drawn. Concerning this determination he makes the following remark: "What we do mean by the word proximate is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." But it is a drastic qualification of the English rule, nevertheless. This we shall call the Andrew's view.

Now before I discuss these views outlined above, I wish to add another view of proximate cause which I shall call the "Intervening Agency" view. This arises out of the type of case where the defendant's negligence paves the way for a human or other agency either criminally, negligently, or pursuant to the laws of nature, to introduce the effective means of causing the harm. For an instance,²⁷ the defendant is making repairs in

²⁵ The case was submitted to the jury which found negligence, and Cardozo apparently did not deny that there may have been negligence toward the prospective passenger.

²⁶ It has been argued that if negligence were relative to the plaintiff's interests, the harm is actionable under Cardozo's opinion even if caused by a hazard not foreseeable. Thus, it is claimed, Cardozo would also have decided the *Polemis* case for the plaintiff, even assuming that the arbitrators' findings of fact were binding. I do not believe this is so at all, and I think Cardozo very carefully refrained from committing himself on this apparently logical implication of deciding that a plaintiff can recover only for damages caused by negligence toward himself. He declared that a defendant is not liable to a plaintiff toward whom he was not negligent, *not* that a defendant is liable to everyone toward whom he is negligent. There is a difference; and I think this difference can be found in my analysis of Cardozo's view.

²⁷ *Andrews v. Kinsel*, 114 Ga. 390, 40 S.E. 300 (1901). Cf. *Brower v. N.Y.C. & H. Ry.*, 91 N.J.L. 190, 103 Atl. 166 (1918).

the plaintiff's house in the plaintiff's absence and leaves the front door open when he goes home from work. After dark someone enters and rifles the plaintiff's house. Although what might have been expected from the obvious danger of leaving the door open is exactly what happened, many courts conclude that the defendant should not be held answerable for an intervening, independent human act which, they say, was the proximate cause of the damage, the defendant's negligence being a remote cause. As can be seen, this technique is more a rule of thumb than a view.

IV

These different approaches to the extension of liability for negligence represent different views of policy concerning the desirable legal incidence of negligence. The only one of these views that seems to be clear-cut and fairly understandable is the alleged English view. Courts enunciating this view feel that if a person is negligent and if his negligence causes the harm complained of in the sense that it wouldn't have happened but for the negligence, then as between the innocent sufferer of damage and the negligent defendant, the latter ought to bear the loss by way of compensation.²⁸ If this *is* the English view, I believe it is understandable and fairly easy to apply. The only difficult feature of it is common to all views and to all negligence cases—the determination by the court that there is evidence from which a jury might safely be permitted to draw the inferences of negligence and cause in fact. The policy feature disregarding the unforeseeability of the hazard actually resulting from the negligence and giving rise to the harm in suit is certainly defensible in every way. If any of us is accustomed to a different and less comprehensive view of extension of liability, he may prefer that view to the English rule, but he cannot say it is any better. This judgment lies in the realm of values, and what you choose depends upon what you want. The English judges apparently want a broad rule of liability for what they conceive to be negligence.²⁹

Cardozo on the other hand seems to disagree fundamentally with the policy behind the English view. He remarks that it is liability for *negligence* which is in issue and this implies an opportunity to have been careful in avoiding what is complained of. He regards "what is complained of" as the hazard giving rise to the harm as well as the harm

²⁸ Compare the statement in *Smith v. Lampe*, 64 F. (2d) 201, 203 (C.C.A. 6th 1933), as follows: "There is a respectable and growing body of authority for the rule that reasonable anticipation of injury is important only in determining negligence, while the natural course of events is the test of required causation."

²⁹ See Atkin, L. J., in the *Hambrook* case: "The full effect of the decision in *In re Polemis* . . . has not yet, I think, been fully realized, even though that case laid down no new law."

itself. And if the evidence indicates clearly that the defendant could not have foreseen the hazard which actually brought about the harm in suit, then he was not negligent in not avoiding this hazard. Cardozo makes it clear that he does not mind holding a defendant liable for the highly unlikely and weird consequences of his conduct as long as the general type of hazard or danger bringing about those consequences was reasonably foreseeable.

This view would prevent liability for negligence in several cases where it would be allowed under the English view. But who can say that this is the true or correct view or that it is better than the English approach? As a matter of fact, from the point of view of administrative facility it is less desirable than the English view, since it is so much less easy of application. In the first place, Cardozo did not state his view very clearly, inasmuch as he said enough to make many people believe that he would let a case go to the jury as long as there was evidence of *some kind* of negligence *toward the plaintiff*, although the evidence also indicated that the plaintiff was not hurt by the foreseeable hazard but by a hazard or danger which was not reasonably foreseeable. I must admit that this is one interpretation of his opinion; but I am satisfied from the rest of what he said that this is a misinterpretation of his entire statement. If I am mistaken in this, Cardozo's view is, of course, much broader than I have indicated above and would permit recovery in almost as many cases as would the English view. The very fact that his opinion is open to this plural interpretation, however, shows that it is not completely satisfactory. But I can rest my version of his view on several other cases in which liability is clearly denied because the evidence did not warrant the inference of reasonable foreseeability of the hazard which caused the plaintiff's damage. I might add at this point that I have always thought that Cardozo's view does not always depend on foreseeability of the hazard causing the harm if the evidence indicates that the plaintiff was within range of the effect of the *foreseeable* hazard which made the defendant's conduct negligent, as long as there is a *substantial similarity* between the normal effect of the foreseeable hazard and a normal effect of the unforeseeable hazard which actually causes the harm. But I have no authority for this except the kindly approval of Mr. Cardozo himself in a personal conversation.

Even supposing my interpretation of Cardozo's view is correct, it is still difficult to tell where we stand. In the first place, whenever the evidence indicates that the hazard which caused the harm *might* have been reasonably foreseeable, the court has to submit this issue to a jury for resolution.

And if, as is usually done, the jury is asked for a general verdict, the court never knows whether or not the jury answered this specific query to the effect that this hazard was reasonably foreseeable before it went on to the rest of the issues. As long as the case gets to the jury, in spite of the nature of the instructions required, practically the effect is much the same whether it gets before that august body under one view or another. But this is not all. Under Cardozo's view how are we ever to know in a close case whether the evidence warrants the inference that the hazard which actually caused the harm was reasonably foreseeable? After all, that is a matter of opinion with respect to which judges might differ; and in making such judgments they could not help being influenced by factors which might dictate a particular result which they would find agreeable. Is it, for instance, reasonably foreseeable that if surety bonds executed in blank are left around where they might very likely be stolen, they will be palmed off on creditors as authentic surety bonds by the thieves who pass themselves off as agents of the defendant company?³⁰ Is it reasonably foreseeable that an owner of cattle will die as a result of a broken heart because his cattle die from eating a negligently defective provender supplied by the defendant?³¹ And is it reasonably foreseeable that a mother, who from a point of safety sees her child negligently run down by an automobile, will die of shock?³² After all, a federal circuit court of appeals through a judge of no mean merit seriously declared that it could not reasonably be foreseen that anyone not in privity with a manufacturer of a chattel (not buying directly from the manufacturer) would be hurt by a careless defect in the chattel, whereas it could be if privity of contract were present.³³ On these issues and hundreds of others like them courts have to decide under Cardozo's view whether or not a jury may be permitted to say that the hazard causing the damage was a reasonably foreseeable consequence of the admitted negligence of the defendant. Their decisions on these matters are quite unpredictable.

Much the same sort of thing can be said of the so-called Pennsylvania view or the "natural and probable consequences" rule as it is sometimes called. How can anyone predict what a court will hold to be a foreseeable consequence or eventuality of admitted negligence of some sort? The Pennsylvania court in the *Hoag* case discussed above felt that the burning of plaintiff's barn a quarter of a mile downstream could not be regarded

³⁰ *Benenson v. National Surety Co.*, 260 N.Y. 299, 183 N.E. 505 (1932).

³¹ *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937).

³² *Hambrook v. Stokes*, [1925] 1 K. B. 141.

³³ *Huset v. Case Threshing Machine Co.*, 120 Fed. 865 (C.C.A. 8th 1903).

as a foreseeable consequence of a train of oil cars being derailed by a landslide across the tracks. But the New Jersey court felt otherwise in an almost identical case.³⁴ For after all, the hazard of uncontrolled fire in the country side seemed not improbable. The Pennsylvania court in the *Wood* case discussed above felt that it was not a probable consequence of hitting a person very hard at a crossing so that the body was thrown into the air, that the body would strike someone nearby and hurt him. But the Alabama court felt, at least, that it was a direct effect in a very similar case.³⁵ And in a recent case arising out of Pennsylvania in the federal court, the judge felt that a jury could be permitted to infer that a probable result of leaving dry ice (which expands 500 times in volume) in the street might be a youngster's corking up some in a bottle which in turn would explode, causing injury to another.³⁶

The emphatically important role which foreseeability plays in these views must be obvious to everyone. This is so, whether the inquiry be with reference to foreseeability of the hazard, general or particular, which causes the damage in suit, whether it be with reference to the consequences of the negligence, the eventuality, or whether it be with reference merely to the happening of some harm in order to establish negligence, regardless of the hazard or consequences actually ensuing. How can anyone possibly predict what a court may believe from the evidence to be a sufficiently probable or likely hazard or consequence to warrant submission of the case to or keeping it from the jury? It all depends upon what factors in the evidence a court is willing to isolate and emphasize for the purpose of making this decision, which process in turn depends pretty much on what outcome the court wishes to achieve or thinks to be politic. This factor in the judgment process, in turn, is not usually a matter of conscious choice but may be a function of the judges' accumulated experiences in and observations of the world he lives in.

To illustrate what I am driving at, we may all agree that the death of a housewife is hardly the reasonably probable consequence of delivering at her backdoor a bottle of milk with a slightly jagged edge at the opening. But if we stop to consider that a cut on the hand while removing the top from such a bottle is quite foreseeable, the probability is greatly increased. For cuts lead to infection and then to blood-poisoning, which in turn is

³⁴ *Kuhn v. Jewett*, 32 N.J. Eq. 647 (1880).

³⁵ *Alabama G. S. R. Co. v. Chapman*, 80 Ala. 615, 2 So. 738 (1887). And see *Columbus R. Co. v. Newsome*, 142 Ga. 674, 83 S.E. 506 (1915). But it does not appear in these cases that the courts thought the consequences were foreseeable. In fact, the Alabama court says that recovery will be allowed in spite of lack of foreseeability.

³⁶ *New York Eskimo Pie Corp. v. Rataj*, 73 F. (2d) 184 (C.C.A. 3d 1934).

quite likely to result in dangerous illness or even death.³⁷ Hurting a bystander as a result of striking someone at a railway crossing may be an improbable consequence at first glance; but if we consider that a person (or anything else) struck by a fast train is likely to be catapulted into the air in almost any direction we immediately reflect that what goes up generally comes down, and that in coming down it might easily hit someone who might foreseeably be standing near by. The death of an occupant of a car which defendant carelessly but casually and with slight damage bumps with his automobile is, to say the least, a strange consequence. And even when it is explained that the death was brought about by shock and fright, the result does not seem much more expectable. When what happened is further refined, however, and it appears that the deceased got out of her car to talk with the defendant about the collision and while doing so, fainted and struck her head on the curb, we are not so sure about the improbability of what happened. At least, we have to confess that the hazard of shock and even its possible as well as its normal consequences might reasonably have been foreseeable. But to reach the result of the New York court, which permitted recovery of death damages, the factors leading to recovery have to be carefully and sympathetically isolated, indeed.³⁸ It is true, on the other hand, that the destruction of goods by an entirely unforeseeable flood is definitely an unforeseeable consequence of a negligent delay in forwarding a shipment of goods; and it is hard to impose liability here except by employing a blanket rule like the English or Andrew's view. But this is something else again.³⁹

It cannot be too frequently repeated that we must not ask too much of the concept of foreseeability, even after we have discounted it in light of the remarks just made. For we must always remember that more than the judge's actual experience and his knowledge of the world contribute to his choice of the factors on which a chain of reasonable probability or foreseeability may be based. What he thinks *ought* to be, what he wants to see happen—in other words, his values and his notions of sound and desirable social policy—are bound to play a large part in influencing his choice or repudiation of the factors upon which a claim of probability or foreseeability leading to liability may be created. And if a judge's function is to do justice, this, after all, is no more than we should expect.

To continue with criticisms of the judicial techniques of keeping neg-

³⁷ *Koehler v. Waukesha Milk Co.*, 190 Wis. 52, 208 N.W. 901 (1926).

³⁸ *Comstock v. Wilson*, 257 N.Y. 231, 177 N.E. 431 (1931).

³⁹ If a natural destructive force such as a flood or frost is reasonably foreseeable, it becomes one of the circumstances with respect to which the defendant's conduct should be judged.

ligence cases from the jury, it is apparent that directed verdicts depending on intervening agencies, human or otherwise, are not very satisfactory. For the "intervening agency" might have been the very hazard the likelihood of which made the defendant's original conduct negligent. Let me refer again to the case where the defendant who has been making repairs in the plaintiff's warehouse leaves the door open when he goes home from work and during the night a thief enters and rifles the place. People lock their doors to prevent such things from happening. On the other hand, the intervening agency might be a natural phenomenon such as a flood or high wind or even a normally running brook. If this natural agency is quite unforeseeable, we might expect non-liability to follow. But where it is normally a part of any natural environment it becomes merely one of the circumstances with respect to which the defendants acted. But all sorts of judicial reactions to these "intervening agencies" have occurred in litigation and there is no way of predicting when a court is going to call a brook, a wind or a frost an effective insulating "intervening agency" or a "cooperating agency" which is one of the expectable factors in a normal environment. One is led to suspect that in making such judgments, courts are frequently guided by subconscious desires to achieve certain ends on the basis of considerations not involving the factor of intervening agencies.

The remaining important judicial technique of deciding the issue under discussion is that employed by Andrews in his dissent from the majority decision in the *Palsgraf* case. His view is essentially the English view with the very important qualification that a line has to be drawn somewhere. But the only guide he offers to help us in drawing this line is a resort to "practical politics and a rough sense of justice." In other words, it depends quite frankly upon how the judge in question feels about the wisdom of permitting the imposition of liability by a jury in any particular case. Where the court feels that imposition of liability is permissible, then, as a "matter of law" the defendant's negligence may be called the "proximate cause" of the plaintiff's damage; otherwise it is the "remote cause." Critics will have to admit that this view is engagingly honest. Andrews makes no attempt to conceal the nebulous nature of the judgment function at this point of negligence litigation. But he makes it equally obvious that as far as predictability is concerned, there is no possible helpful rule of thumb to guide one in making the judgment. Administratively this view is not very desirable, for the judge is always "on the spot." But one can hardly condemn this view because it compels judges to isolate the nice point of a case and to pass on it frankly as a matter of policy and expedience. One can simply feel sorry for the lawyer

and student who are attempting to compile some general knowledge of law which they can use in the future as a basis of predicting the probable outcome of other cases.

V

Now this is by no means the whole story on the issue of proximate cause, but it is a good place to make a few general remarks concerning what courts do in deciding whether or not negligence cases should be submitted to the jury for final disposition. Each view is loaded with considerations of policy. Each view has administrative advantages or defects from the point of view of ease in handling and certainty of prognostication. Each view has very little to do with actual cause in fact. And each view is expressed in such exasperatingly general terms that we can never be sure what it means or how it can be generally applied, its use being certain only in the particular case in which it occurs. My continual use of the word "view" in connection with these various alleged views unfortunately implies that each of them *is* a fairly definite view, with a content that can be stated, understood and talked about with some degree of assurance that each communicant knows what is going on in the mind of the other. Now I obviously do not *know* what the English view is; I have gathered what I have stated as the English view from three cases and from the observations of trained men who have held this view and have agreed upon this statement. If most of the profession is more or less agreed upon what a particular view is, I will accept it for purposes of discussion. At the same time, I reserve the right to revise my opinion concerning what this view actually is. I suspect, for instance, that what I have called the Cardozo and the Pennsylvania views are really the same view, except that the former emphasizes those factors in a case which might indicate that the result of defendant's negligence was probable or foreseeable, whereas the latter ignores these clues and looks only at the damage in light of normal expectancies. That is to say, under the Cardozo formula the step by step method might lead up to foreseeability of what happened, whereas the eventuality itself might, without consideration of the intermediate steps, seem quite improbable. But if the same view is applied in two such dissimilar ways to a given case so that the outcome of the case under one approach is submission to the jury and under the other is a directed verdict for defendant, I think there is pretty good reason to conclude that there are two views and not just one.

I can also imagine the statement that the English and Cardozo views are much the same.⁴⁰ For there is some indication in all three of the

⁴⁰ See Green, *Judge and Jury* c. 8 (1930).

English cases, on which this purported view is based, to show that negligence is not actionable unless it appears that it was negligence toward—related to—the plaintiff. Of the *Smith* case it could be and has been said that foreseeability of fire in the country side related the negligence to all property owners, including the plaintiff, whom uncontrolled fire might endanger. In the *Polemis* case it is clear that the admitted negligence of dropping the plank *was* toward and related to some interest of the plaintiff. And in the *Hambrook* case, Lord Atkin, in stating the general rule of extension of liability, remarks in part: "Once a breach of duty *to the plaintiff* (italics mine) is established one has no longer to consider whether the consequences could reasonably be anticipated by the wrongdoer." If the argument referred to above—that Cardozo would permit imposition of liability wherever it appears that defendant was negligent with respect to or toward the plaintiff—is put alongside this version of the English view, certainly anyone choosing to conclude that the two views are much the same could not be too severely criticized. My only answer (and I fear it would be thrown back at me) would be that one adopting this interpretation had read too much into the English cases and Mr. Cardozo's opinion in the *Palsgraf* case.

At any rate, a discerning student should by this time have some notion concerning what we are up against. These various views suggest embodiments of general policies in dealing with negligence litigation. If we deal only with the average types of cases that come up, by and large it doesn't make much difference which view is employed to rationalize decisions, since, with a few exceptions, the results will be fairly homogeneous anyway. It is with respect to the odd or unusual cases that inconsistency in result most frequently occurs. Perhaps we are not warranted in worrying too much over the outcome of such cases. Perhaps the courts and legal scholars are at fault in attempting to state the rules of extension of liability so broadly as to include these unusual cases. On the other hand, it might be vigorously and perhaps successfully maintained that these views we have been talking about have been addressed exclusively to the odd and unusual cases and that for the general run of negligence cases we do not need any view or rule governing extension of liability for negligence since the issue never assumes a position of any importance in them.

One feature of these rules or views which has been mentioned before is their abstract nature and their assumption of general application. A student reading them would suppose that a court decides all types of cases on the basis of the same abstract approach, whether it involves auto-mobiling, the sale of drugs, railroads, explosives, natural forces, and so on.

And in a way, he would be correct in this supposition. For all one can tell in reading what judges write in their opinions and what most legal scholars say in their articles and books, these rules are thought by the courts to apply generally regardless of the factual and social nature of the cases before them. But it is pretty hard to believe that this is actually so. The factual context of this issue and notions of strict or moderate liability depending upon whether or not something of unusual danger has occurred or the case involves an enterprise which is thought best able to bear loss⁴¹ or which is not as economically or socially desirable as some others, probably play a greater part in extension of liability for negligence than most of us realize. This does not mean that courts are conscious of this sort of influence in the application of general principles to particular cases, if such an influence is indeed operative. It is simply an attempt to draw attention to a matter which has occasionally been remarked on by others. Consideration of this possibility is salutary enough, since if it is not true there are some pretty good arguments why it should be and why judicial consideration of extension of liability should be addressed to the facts of life and society in specific type situations rather than to the general application of a general abstract proposition to all kinds of social situations.

VI

Some mention appeared above concerning a judicial technique of avoiding the so-called issue of proximate cause where literal application of the formula approved by the court in question would probably result in liability. Take, for instance, the case where defendant so manages his automobile that a child is negligently injured or killed and its mother who hears about it or sees it happen from a position of safety suffers shock as a consequence from which she dies or has a miscarriage or serious breakdown. The hazard of injury or death to the child on the street or sidewalk is a foreseeable consequence of careless driving. So also, it has been held, is shock and possible death to the mother who sees or hears about the calamity; at least she or her administrator has been permitted to recover in such a case.⁴² The Nebraska Supreme Court is willing to extend this notion to the cattle owner who died of anguish over their negligently caused deaths.⁴³ The rescue cases are not much different from this, the emotion aroused in that type of case by the defendant's negligence being not shock and anguish but the altruism which impels another into the

⁴¹ See Feezer, *Capacity To Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. of Pa. L. Rev. 805 (1930).

⁴² *Hambrook v. Stokes*, [1925] 1 K. B. 141.

⁴³ *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937).

field of danger.⁴⁴ Courts could dispose of these cases either way, for defendant or plaintiff, by application of one of these formulae of proximate cause or extension of liability for negligence. But they might also dodge these formulae and dispose of them under the duty issue. The Wisconsin court, in a suit for death of a mother who, from a window, saw her child killed in the street by the defendant's automobile, refused to follow the *Hambrook* case and held that defendant have a directed verdict.⁴⁵ Wickhem in his opinion stated that the English court reached its result under the proximate cause formula, but that the Wisconsin court preferred to decide the case in terms of duty. He then declared that in Wisconsin the duty of a motorist to exercise care is confined to those who are in the street or beside it and who are normally endangered by automobiling, leaving the more definite scope of this duty to future decisions as cases arise. Another beautiful example of a case in which the court admitted that it was not only possible but also customary to impose or reject liability under either the "proximate cause" or "duty" issue or both is *Comstock v. Wilson*.⁴⁶ In that case defendant had carelessly bumped deceased's car, causing slight damage. The deceased alighted to talk with the defendant and while doing so fainted as a consequence of the shock, striking her head on a curbstone. The court permitted recovery, dealing with both issues favorably to the plaintiff, although it is apparent that a contrary decision might easily have been rationalized under a narrower conception of either duty or proximate cause. It is interesting to wonder what the Wisconsin court would have done in this case and in *In re Guardian Casualty Co.*⁴⁷ In that case two cars negligently driven collided so that one went across the sidewalk striking a stone arch over a driveway. When this car was removed by a wrecker about half an hour later, a stone from the archway which had been loosened by the collision fell and killed the owner of the building who had come to see what was going on. The issue before the court was the responsibility of two insurance companies under policies issued to the negligent drivers, protecting them from liability for injuries to others caused by their careless driving of automobiles.

The idea that most cases in which the issue of proximate cause predominates might just as easily be decided under the duty issue is by no means new. If the terms and approaches of "duty" and "proximate cause" are regarded as merely conventional ways of talking about legal liability,

⁴⁴ *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921).

⁴⁵ *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935).

⁴⁶ 257 N.Y. 231, 177 N.E. 431 (1931).

⁴⁷ 253 App. Div. 360, 2 N.Y. S. (2d) 232 (1938).

it follows that either manner of speech can be employed with respect to the issue of extension of liability for negligence in almost any case. In fact, it is frequently asserted that if the disposition of negligence litigation is ever to become understandable and be put on a common basis in all jurisdictions, courts will have to adopt a new approach more or less along the duty issue line for solution of the problem of extension of liability for negligence.

Suppose, therefore, that courts begin with the proposition that the law of negligence is a series of rules of protection, the sanction behind which is the imposition of civil damages. Then, instead of saying that if a defendant is negligent and his negligence contributes to plaintiff's damage, liability will follow, suppose the court determines the scope of protection guaranteed by the observance of care in particular fact situations and inquires whether or not the evidence indicates that these rules of protection were violated.⁴⁸ We would then have hundreds of decisions in which courts asserted that the conduct involved was required under the circumstances to be undertaken with "due care" (according to normally recognized methods of pursuing this conduct as most people pursue it) in order to avoid the normally foreseeable dangers attendant upon a failure to exercise care. Courts would ask: "Why do we call this conduct negligent and why do we require the exercise of care? What is the purpose of this rule of protection? Against what risks (dangers, hazards) do we maintain this guarantee?" Something akin to the so-called "legislative purpose doctrine" which is employed in basing liability on breach of a criminal safety statute would be invoked.⁴⁹ The net result of this would be the isolation and uncovering in each negligence case of the social problem involved and the exercise of the court's notions of policy with respect to this problem.

But I think that we would be deceiving ourselves if we really believed that under this approach we had anything different from what we already have under what I have been calling the Cardozo approach. Furthermore, we would eventually be no better off than we are now, for some courts might take a broad and others a narrow view of the scope of protection afforded by the requirement of due care in any fact situation. Presently we would have some courts declaring that the rule of protection guaranteed safety against *any* consequences of a foreseeable hazard and others, only against

⁴⁸ This is substantially what Green recommends in his books and articles. See his *Rationale of Proximate Cause*.

⁴⁹ On this see Thayer, *Public Wrong and Private Action in Selected Essays on the Law of Torts* 276 (1924). Observe the technique of Cardozo, J., in *De Haen v. Rockwood Sprinkler Co.*, 258 N.Y. 350, 179 N.E. 764 (1932).

foreseeable or probable eventualities or consequences themselves, regardless of foreseeability of the hazard causing the harm. Then courts adopting either one of these views would differ as to which hazards they thought were foreseeable in particular conduct or what eventualities they considered probable and how this probability should be determined. The upshot, I fear, is that the issue remains the same, no matter what we call it or how we analyze it, and the "escape mechanisms" will also remain the same, whatever we call them, ready to be invoked whenever particular courts dislike the literal implications of their particular formula for extension of liability for negligence.

VII

Of the leading essays on proximate cause I have little to say.⁵⁰ Most of them speak for themselves. The positive programs suggested in some of them, explorations into the world of fiction and fancy completely unrelated to the ways in which practical men think, are to me utterly incredible. Edgerton and Green alone seem to have any practical appreciation of the problem, but the former, I believe, makes the mistake of taking Beale's essay too seriously, is too sure of the correct policy behind the extension of liability for negligence, and greatly exaggerates the role which the jury plays in resolving this so-called issue of proximate cause. In my opinion Green sets up too elaborate an analysis and is also rather sure of the correct policy to govern extension of liability for negligence. Furthermore, he goes out of his way to be deferential to Smith's "substantial factor" formula, although he is quite aware that this has nothing to do with the main issue under discussion and is only a set of words with which to submit the simple cause in fact issue to the jury after the important issue for the court has already been decided in the plaintiff's favor.

Perhaps Smith's essay has had more influence than any other and is generally conceded to be the most authoritative account. This puzzles me since I find it hard to believe that Smith fully appreciated what the real problem of proximate cause is. He is not greatly troubled about extension of liability for negligence, which is the only thing that troubles me. He says that the correct view is to impose liability for negligence which is a substantial causal factor in bringing about the harm in suit, essentially what I have called the English view. His chief worry is how to submit the case to the jury. But this is not the problem concerning which most of the essays on proximate cause have been written or upon which most of the outstanding decisions on proximate cause have been made. This is a simple cause in fact issue; and if the court has decided to submit a case to the jury, it has already decided in the plaintiff's favor the only real

⁵⁰ Most of these are cited in note 3 *supra*.

issue of proximate cause with which I am familiar. It is true that under, say, the Cardozo view, there may be some doubt concerning the reasonable foreseeability of the hazard which caused the harm in suit. In such a case, in contrast to the *Palsgraf* case where there was no doubt on this feature, the court will submit the case to the jury with instructions that the verdict is to be for the defendant as long as it finds that this hazard was not reasonably foreseeable, in spite of additional findings that there was negligence of some sort which did contribute to the harm. But this is different from the proximate cause issue before the jury which Smith writes about.

He deplors the "but for" formula and suggests that if a case gets to the jury, it be instructed on negligence and then be told that if the negligence was a "substantial factor" in bringing about the damage, the verdict shall be for the plaintiff.⁵¹ It would, of course, be hard to disprove of this recommendation, although I see nothing wrong with the "but for" rule as a means of accomplishing the same purpose. Certainly, if the plaintiff's damage would not have occurred, but for the defendant's negligence, most people would probably regard it as a substantial contributing factor. But since the "but for" rule is inadequate in a few specialized types of cases,⁵² its general application is certainly questionable. Use of the words "proximate cause" in the charge to the jury is unfortunate since it merely perpetuates the illusion that the issue before the jury is the same one which the court has already passed on under that name. This procedure might puzzle many, although it probably doesn't make much difference to the jury unless the judge attempts to define proximate cause in his instructions, in which case the jury will only be confused.

It is hard to believe that a good appellate court could get hopelessly mixed up in applying Smith's substantial factor test. But that seems to be what happened in *Mahoney v. Beatman*,⁵³ where Judge Wheeler apparently read a great deal into the words "substantial factor" which many others have been unable to perceive. In that case the plaintiff was driving

⁵¹ In this connection it is interesting to note that Professor Smith was one of the court in *Gilman v. Noyes*, 57 N.H. 627 (1876) and that he wrote a concurring opinion.

⁵² Cases of this sort are *Corey v. Havener*, 182 Mass. 250, 65 N.E. 69 (1902) and *Kingston v. Chicago & N. W. Ry.*, 191 Wis. 610, 211 N.W. 913 (1927) in which it appears that the harm might easily have occurred "but for" the defendant's negligence, that is, some other similar hazard might easily have caused the harm; yet if the evidence indicates that the defendant's negligence was contributing thereto or would have caused it alone, then the defendant may be held liable anyway, despite the fact that the other hazard would have caused the harm. This is a very interesting point which is adequately discussed in most of the leading essays on proximate cause; but I do not wish to discuss it because it involves an essentially different issue from that which is being explored in this article.

⁵³ 110 Conn. 184, 147 Atl. 762 (1929).

a Rolls-Royce south at an unreasonably fast speed. Defendant, driving north, negligently pulled across the road, forcing the plaintiff's right wheels onto the shoulder. The hub cap of their left wheels and their fenders touched, causing \$200 damage to the plaintiff's car. The plaintiff went on for 125 feet and then lost control of his car, chiefly because of his great speed, hitting a stone wall and suffering \$5000 more damage to his car. The case was tried without a jury and the court found defendant negligent but entered judgment for only \$200 (caused by the contact of the cars) denying judgment for the rest of the damage apparently because of plaintiff's contributory negligence.⁵⁴ The plaintiff appealed and secured a reversal with instructions to have judgment entered for full damages of \$5000 plus. The court made this the occasion for a long discussion of proximate cause in which it confessed the utter confusion among judges and writers on the subject. It went on to say that Smith's substantial factor test was the best rule and declared that since the evidence showed that defendant's negligence was a substantial factor in causing all of the damage suffered, he should assume liability therefor. A dissenting justice tried his best to show that the real issue was the plaintiff's negligence and that the court should consider *why* traveling at sixty miles an hour was negligent. He felt that if one of the hazards to be avoided by requiring observance of a reasonable speed in motoring was loss of control of the car in normally foreseeable exigencies and if the loss of control contributed to (was a substantial factor in bringing about) the additional damage, as it undoubtedly was, the plaintiff's recovery should be confined to the damage resulting from the contact alone.⁵⁵

⁵⁴ The trial court found, among other things, that "(2) the speed of plaintiff's car was unreasonable but it did not contribute to the collision which was due entirely to the negligence of the defendant, (3) the speed did, however, materially hamper plaintiff's chauffeur in controlling the car after the collision and owing to it he completely lost control of it."

Note the two excerpts from the dissenting opinion of Maltbie, J.: "With reference to the particular case before us, I am not able to see how the discussion in the majority opinion is involved at all. The decision of the lower court did not go upon the theory that there was any *actus interveniens* but upon the theory that there was negligent conduct on the part of the plaintiff's driver which while it did not proximately contribute to produce the accident still did result in greatly increasing the damage from it.

"It is true, as the majority opinion points out, that the finding of the trial court is only that the plaintiff's car before the injury was proceeding at an unreasonable speed. Upon a strict construction of the finding it might be said that this statement falls short of charging the driver of the plaintiff's car with negligent conduct and so the conclusion of the trial court fails of support even as regards the principle it adopted. This situation, however, would call, not for a remanding of the case with direction to enter judgment for the plaintiff for all the injuries following upon the accident, but for remanding it to be proceeded with according to law."

⁵⁵ See Harper, *The Law of Torts* 299 (1933); see also Green, *Mahoney v. Beatman: A Study in Proximate Cause*, 39 *Yale L. J.* 532 (1930).

I suggest that no more eloquent commentary can be made on Smith's substantial factor test and its effectiveness in solving the issue under discussion in this article than the mere statement of the decision and opinions just referred to. My account is, of course, very synoptic; but reference to the report of the case will supply any deficiencies.

Anyone reading this far may complain that my treatment of the essays in this field has been rather summary and that I have exposed myself to adverse criticism on several grounds. But I stand on the position that I am trying to protect first-year students against the bewildering accounts of proximate cause which have been in vogue for some years. I mistrust most of these essays and their authors' attempts to resolve the issue under fire. I agree with Edgerton and Green that there is no easy road to certain prediction through the help of general rules, "workable" or otherwise, and that in the last analysis the courts must, within very broad premises of policy, decide what is just in each case. It has never occurred to me that my knowledge of the issue under discussion is superior or that my ideas are particularly original. I am simply stating my own opinion and views for what they are worth.

VIII

This discussion is long and rambling. It has been a process of getting something off my chest. I may have contributed something to the isolation of the considerations which courts must entertain in determining the extension of liability for negligence. I hope I have stated the issues which I believe law students should be aware of. But I know that I have solved nothing and, indeed, I had not set out to do so. As a positive program of my own I can only emphasize the distinction between the functions of the judge and jury in dealing with their respective issues which commonly travel under the same name of "proximate cause"; and I cannot end better than by repeating the famous statement from Street on Foundations of Legal Liability:⁵⁶

"The terms 'proximate' and 'remote' are thus respectively applied to recoverable and non-recoverable damages. . . . It is unfortunate that no definite principle can be laid down by which to determine this question. It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other."

⁵⁶ 1 Street, Foundations of Legal Liability 110 (1906).