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Confusion of the Terms Proximate and Direct

Ralph S. Bauer

CONFUSION OF THE TERMS "PROXIMATE" AND "DIRECT"*

Although it would be unreasonable to suppose that perfect exactness of legal terminology would be a panacea for all the ills that beset humanity in the adjudication of its disputes, it seems perfectly reasonable to believe that glaring inexactness and confusion in the use of legal terms is one of the important causes of obscure and uncertain legal thinking and of consequent irregularity and inefficiency in the administration of justice, and that the attaining of a higher degree of exactness would tend toward clarity of thought and toward a somewhat more systematic disposition of cases.[1] The terms "proximate" and "direct" have been used, in too loose a manner, as synonymous, thus sometimes making the issue less clear than it could be made if the terms were used with more of regard for their true and usually accepted meanings.

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1 Of course, when one considers the fluid nature of much of the law of torts, particularly the law of negligence, it must be realized that there are limits to the efficacy of improvements by attempts merely to stabilize legal terminology. See: HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS; GREEN, RATIONALE OF PROXIMATE CAUSE.

The tendency of lawyers to confuse the terms "proximate" and "direct" seems to be merely part of a broader tendency to collect a fog around many, if not most, Latin derivatives. In the period from before the twelfth to a time after the sixteenth century, the English language was poor in words of the kind needed in the practice of law and of other learned professions. Latin words and Latin derivatives were employed by English lawyers possessing little or no knowledge of the Latin language. The Year Books in the thirteenth century bear witness abundantly. In the year 1202, cases give us: *roberia* for robbery, *robaverunt* for robbed, *gardino* for garden, *burgatus fuit* for "he had burglary committed against him," etc. As late as 1587, we have *in shopa sua* for "in his shop," in Bloss v. Holman, Owen, 52. Obviously, the lawyers knew so little Latin that they ran English words through Latin conjugations and declensions in order to fill out deficiencies in their vocabularies. With law Latin thus merrily started on its way by a bar ignorant of Latin words, is it strange that Latin derivatives in legal language have come to mean almost anything?

The terms "proximate" and "direct," as used in connection with the law of liability and of damages, have different meanings; and these meanings are probably about as well-defined in a general way as terms so comprehensive can ever be. The fact that these words have widely different meanings is not unknown to any moderately well-informed lawyer; but courts have occasionally used them, in the discussion of important cases, as if they were synonymous and interchangeable. This may seem unimportant; but the error has clearly had an undesirable influence in the shaping of the law of proximate cause, so-called, tending, as it does, to prevent our seeing exactly whither we are headed in the development of this important subject.

"Direct damages are those which are so closely connected with the wrong complained of that they may be said to be involved in the assertion of the right of action. In the case of personal injury, bodily injury and pain; in that of libel, damage to reputation; in that of conversion, loss of the thing converted; in that of trespass upon land, damage to the property; in that of the breach of a contract, the loss of the advantage which was the object of the contract,—all are direct. Proximate damages (which include direct damages) are such as flow proximately from the cause of action, that is, are so connected with it as results of it, that the law regards the person responsible for the cause of action as responsible also for them. Remote damages are all other results not so connected." [2]

DIRECT	CONSEQUENTIAL
PROXIMATE	REMOTE

If the line below be taken as representing all results, we see that all direct results are within the portion of the line marked "proximate," but that not all proximate results are

[2] SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES (2nd ed.) 45, 46.

within that portion of the line marked "direct." The fact that all direct results are proximate is probably one of the facts resulting in the confusion of the two terms. Perhaps an even more potent cause of the confusion is the similarity of the meanings of the two terms in the every-day language of the laity.

Whatever may be the cause of the occasional treating of these words as if they were synonymous, it can safely be said that the above quotation from A. G. Sedgwick represents the law as exhibited clearly by the overwhelming weight of authority. Any attempt to treat the two words as having exactly the same meaning will result in more of trouble than it is possible to calculate. If we treat both terms as having the meaning properly given to "direct" and say that all damages, in order to be recoverable, must be direct, we eliminate from our law all possibility of any recovery for any kind of consequential damage. On the other hand, if we treat both terms as having the usual meaning accorded to "proximate," we raise the troublesome question whether we shall then require proof of proximtiy of cause and result in the most ordinary and most obvious cases of direct damage.

Of all the cases involving the question of proximity, negligence cases are the most difficult and frequently the most misleading, the question of the fact of negligence often being hopelessly mixed with the question of the proximate relation of the negligence to the injury. In an Alabama case,[3] a boy, nine and a half years old, attempted to climb upon a freight train and enjoy a ride. In violation of a village ordinance, the train was then going at a faster rate than four miles per hour. The boy missed his footing, fell, and was killed. The court held that the railroad company was not liable, as its negligence was not the proximate cause of the wrong. Judg-

[3] Western Ry. v. Mutch, 97 Ala. 194, 11 So. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179 (1892).

No attempt is made in this article to make an exhaustive study of numerous cases. A few typical cases have been selected as illustrations.

ment for the defendant could more easily and simply have been sustained on the ground that the defendant had violated no duty toward the boy and that therefore there was no negligence upon which to ground the action. But the court, instead of doing this very obvious thing, proceeded to discuss the relation of the violation of the ordinance to the damage, quoting with approval the following passage from the American and English Encyclopedia of Law:[4]

"To constitute actionable negligence, there must be not only a casual connection between the negligence complained of and the injury suffered, but the connection must be by a *natural and unbroken sequence,* without intervening efficient causes, so that but for the negligence of the defendant the injury would not have occurred. It must not only be *a* cause, but it must be the *proximate,* that is the direct and immediate, efficient cause of the injury."

Probably the first sentence of this quotation would be generally approved; but the latter proposition, that negligence, in order to be actionable "must be proximate, that is, the *direct* and immediate, efficient cause of the injury," may well give us pause, since it restricts "proximate" to "direct." If a negligent defendant is never to be held liable for any except direct and immediate effects of his negligence, negligent persons will probably escape, in most instances, from liability for some of the most injurious consequences of their negligent acts.

One very well-known case,[5] in which a railroad company was very properly held liable for a miscarriage consequent upon a long walk which a passenger found necessary because of being negligently directed to leave the train three miles from her destination, treats the miscarriage as being a "direct" result. It would seem reasonable to treat such a result as being proximate rather than direct. Undoubtedly the case is right in its result, when all the circumstances are considered; but can we not make better sense out of the dis-

4 NEGLIGENCE, 16 AM. & ENG. ENCY. OF LAW 431.

5 Brown v. Chicago, M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41 (1882).

cussion by substituting "proximate" for "direct" in the following excerpt from the opinion of Justice Taylor in this case:

> "In the case at bar the question to be determined is whether the negligent act of the defendant's employe in putting the plaintiffs and their child off the train in the nighttime, at the place where they did, was the direct cause of the injury complained of by the plaintiffs, or whether it was only a remote cause for which no action lies."

The question was not whether the court should choose to denominate the result as "direct" or as "remote," but rather whether it should choose to call it "proximate" or "remote." Better yet, it might be said that the real issue was simply, "Was there casual connection between defendant's wrong and the miscarriage?" [6] Of course, there would be little difficulty in saying that injury to health and a miscarriage were results that were protected against by the rule of conduct to the effect that defendant must discharge a woman passenger at the right station.

Later, in the same court, in *Chamberlain v. City of Oshkosh*,[7] a case wherein a city had negligently permitted a hole to exist in a street, the hole became filled with water, and the water became frozen, thus producing ice on which a pedestrian fell and was injured, the city was held not liable for the injury, on the ground that "the hole was only the remote cause, or cause of causes which produced the result, and was not the direct, efficient, or adequate cause, which alone is actionable." The court confused "direct" with "proximate," as will be seen by the following extract from the opinion:

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[6] GREEN, RATIONALE OF PROXIMATE CAUSE 146.

[7] 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928 (1893). It is interesting to notice that the Wisconsin court, which has thus used the words "proximate" and "direct" rather loosely in these two cases, has, in its practical application of rules of causation, been, in most cases, far-sighted, liberal, practical, and clearly just to the plaintiff who seeks to recover consequential damages. See McNamara v. Village of Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722 (1885).

"The depression was the cause of the water accumulating there, and the water, combined with a low temperature, caused the ice to form which injured the plaintiff. The depression was a remote cause or cause of causes. The proximate or direct cause was the ice, and this must be the cause of action. *'Causa proxima, non remota, spectatur.'*—The proximate, and not the remote, cause must be considered. The cause nearest in order of causation, which is adequate to produce the result, is the direct cause. In law, only the direct cause is considered. These are familiar maxims."

If the reasoning here is correct, it follows that damages for consequential loss never can be recovered. It would also follow that the decision, by the same court, that the plaintiff in *Brown v. Chicago, M. & St. P. Ry. Co.*[8] could recover for illness occurring as a consequential result of the direct injury, is all wrong; which probably few lawyers would be willing to admit. One source of trouble in the *Chamberlain* case is that the court fails to make any distinction whatever between "direct" and "proximate" and to recognize the fact that damages for consequential losses can ever be recovered. Another source of difficulty is the willingness of the court to treat the "proximate cause" problem as a thing to be settled by the application of a fixed and arbitrary rule instead of regarding the problem as one varying according to the facts and largely for the jury. Fortunately, such artificial reasoning, which has an appearance of right or logic only when one quickly glances at the veneer of seemingly plausible statements as to directness and proximity,[9] is not

[8] *Op. cit. supra* note 5.

[9] Both Brown v. Chicago, M. & St. P. Ry. Co., *op. cit. supra* note 5, and Chamberlain v. City of Oshkosh, *op. cit. supra* note 7, are frequently used as material for study in law schools; and probably it is just as well that they be so used, as these cases seem to have influenced the development of the law of proximate cause in a measure out of proportion to their accuracy of expression. It is necessary that the law student study the loosely reasoned and inaccurately expressed opinions that have had any real part in shaping our law; but, if the student did not have any lectures or textbooks to set him right on the subject of proximate cause, it is probable that the study of these cases would frequently help to mingle proximity and directness in one confused mass in the mind of the student and to cause him to forget that there is any difference between the two terms. The fact that such cases are regarded as leading cases, and the further fact that there is an element of truth in their implications, often tend to make even the most experienced lawyer accept them as law, without questioning their general soundness of calculating the final far-reaching effect of accepting the rule

always followed in cases similar to this one on the facts.[10] To say that all proximate results are direct, is like saying that all sheep are lambs. Some proximate results are direct, and others are consequential. To say that all results not direct are not proximate, is just as fallacious.

In *Brown v. Chicago, M. & St. P. Ry. Co.* the plaintiff's illness and miscarriage constituted consequential damage of a kind commonly called "proximate." In *Chamberlain v. City of Oshkosh,* it may well be contended that the plaintiff's fall and the damage to her person were results proximate though consequential.

In a personal injury case, destruction of tissue and bruises may be direct results of the negligent act of defendant; but doctors' and hospital bills, loss of earnings, and mental and physical suffering may be proximate, though consequential, results.

"Proximate," as used in a great many decisions, is a mere question-begging term, the court calling the damage "proximate" because it thinks that it is just to allow recovery therefor, and then proceeding to say that damages can be recovered therefor because the damage is proximate. Yet, to make damage legally compensable, it need not be direct. The real question is, "Is the damaging result complained of really an encroachment upon an interest of plaintiff protected by the rule of conduct invoked?" [11] A result against which there is legal protection may in fact be very remote, although, if a court is going to allow damages for it, it will call the remote result "proximate." A compensable result may be exceedingly remote, if it only be within the protection of the legal rule of conduct invoked. Of course, this is not denying that proximity and remoteness are sometimes per-

of the particular case (perhaps one of unusual circumstances) as a universal and unfailing rule of law.

10 Adams v. Town of Chicopee, 147 Mass. 440, 18 N. E. 231 (1888); Gaylord v. City of New Britain, 58 Conn. 398, 20 Atl. 365, 8 L. R. A. 752 (1890); McCloskey v. Moies, 19 R. I. 297, 33 Atl. 225 (1895); and other cases.

11 See GREEN, RATIONALE OF PROXIMATE CAUSE, Chapter I.

suasive in a close case. Too much of the time, in the jargon of the courts, "proximate damages" signifies exactly "recoverable damages." A wrong may be a cause of causes and still, in every often accepted legal sense, be proximate to the wrong inflicted by the defendant.

Probably most lawyers agree that, strictly speaking, "direct" and "proximate" are not synonymous; and probably most of the judges and writers who have fallen into the use of the word "direct" as signifying "proximate" would not care to argue seriously that only direct damage is ever proximate. If judicial language in such cases were so framed as to say what is meant to be said, and if there were greater strictness of expression in all decisions, we should have judicial opinions that would constitute somewhat more satisfactory precedents for the decision not only of exactly similar cases, but also of cases of the same general class. Of course, it has long been understood by many lawyers that, in construing many of the cases on causation, including a number of the leading ones, we have to consider them as precedents for what they mean and do rather than for what they say.

Perhaps with the development of our modern case law, with judicial opinions verbally dictated to a stenographer, and the rapid increase, during the past sixty-five years, of law study by the case method, the art of verbal definition is being lost any way; and few real scholars will regret the passing of the time when the learning of mere legal definitions constituted a large part of a law curriculum. Yet, if we are to have any of the clearest possible precedents, on direct and proximate results, or on any other subject, we must come to something that approaches a reasonable degree of uniformity of meaning of each legal term. The meanings of "direct" and "proximate" recognized as correct by the great weight of authority should be given uniform recognition.

Ralph S. Bauer

De Paul University.