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right of eminent domain. That such was contemplated is borne out by the contract provision that if the United States determines the title to be unsatisfactory it may acquire title by condemnation, the vendor agreeing to accept the price named in the contract as the proper amount to be paid to him for all resulting damages.

—Claude W. Stimson.

DUTY VERSUS PROXIMATE CAUSE IN THE LAW OF NEGLIGENCE—A COMPARATIVE STUDY

In the law of tort liability, what will be the attitude of the Montana Supreme Court where defendant's negligent conduct threatens class A with unreasonable risk of harm, and injury results instead to B, who is a member of a class outside the zone of any apparent danger? Such an inquiry is suggested by the leading case of *Mize* v. *Rocky Mountain Bell Telephone Company*.[1] This case, decided by Justice Holloway in 1909, has been freely cited in later cases in Montana. In the meantime, Justice Cardozo has decided the much discussed case of *Palsgraf* v. *Long Island Railway Company*[2] in the New York Courts. The present inquiry is directed to an examination and comparison of the *ratio decidendi* of these and related cases.

In *Mize* v. *Rocky Mountain Bell Telephone Company,* plaintiff's intestate (not a trespasser) was killed while working in a field some ten miles from a city by coming in contact with a fence wire. The wire fence had been charged with electricity by means of the wire of an electric power company, which in falling upon a telephone wire in the streets of the city, charged the latter, and it in turn transferred the current through a guy wire to the fence wire. The Court held that plaintiff might recover against both the power company and the telephone company because (1) a legal duty was owed the deceased and (2) the negligence of the defendant power company was the proximate cause of the death. The Court found a "duty enjoined by the rule which requires everyone to so use his property as not to injure another." Further, the Court held that electric companies are bound to use reasonable care in the maintenance of their wires along streets and highways for the protection of persons under the same rule which makes the owner of a vicious animal liable for the damage it does if negligently allowed to escape.

[1]38 Mont. 521, 100 P. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189.
[2](1928) 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253.

As a study in proximate cause, there should be no obstacle to plaintiff's recovery. The fact that ten miles intervened between the situs of the negligent act or omission and the place of the accident is not controlling; proximate cause is not bounded by considerations of time and space.[3] The causation was direct in physics or mechanics; there was no intervening force dependent or independent, and no activity which could be said to be isolating or superseding.[4] But, as a study in duty, the case is not so clear.

The reasons given for the decision would appear to be questionable. First, the statement of duty in terms of the Latin maxim, *"sic utere tuo ut alienum non laedas,"* is of doubtful application in a case of this kind;[5] at best it is but a vague generalization, used as a stereotyped form for gliding over a difficulty without explaining it. It developed in a period when a general duty was assumed. Unquestionably there are many persons toward whom a likelihood of danger may be recognized, but as to whom a defendant may properly say it is none of his concern. It is now generally accepted that there must be some limitation upon the liability of the unintentional wrongdoer in line with the idea that tort liability for negligence is based upon the creation of an unreasonable risk to a particular plaintiff.[6] A rule which makes anyone who injures another liable to anyone he may harm belongs in the field of intentional torts wherein is recognized the doctrine of "transferred intent." It is more like a criminal law technique.

An analogy between the escape of a vicious animal and the escape of electricity implies an absolute liability for the escape of the latter as a dangerous thing. Assuming that to be the accepted rule,[7] a court should recognize that strict lia-

[3]See Beale, *The Proximate Consequences of an Act*, 34 HARV. L. REV. 642 (1920).

[4]RESTATEMENT, TORTS, §442, 443.

[5]Literally translated, the maxim applies only to injuries to property, and it seems to have been so limited in English common law. BROOM, in his work on LEGAL MAXIMS, makes a broad interpretation, viz., "So use your property as not to injure the rights of another," but it is said this is an unwarranted expansion, unsupported by his cited cases. Smead, 21 CORN. L. REV. 285 (1936). See also Smith, 9 HARV. L. REV. 16, 17 (1895) to the effect that no such legal principle ever existed, although commendable as a *moral* precept. Cases cited under R. C. M. 1935, §8743, do not include personal injuries; but see City Electric St. Ry. Co. v. Conery (1895) 61 Ark. 381, 33 S. W. 426.

[6]Barrus v. Western Union Tel. Co. (1936) 90 Utah 401, 62 P. (2d) 116; Flynn v. Gordon (1933) 86 N. H. 198, 165 A. 715; RESTATEMENT, TORTS, §281. Comment c.

[7]With the exception of a few cases, absolute liability is not the rule as to electric power companies. Probably what is meant is to compare the high standard of care required.

bility is probably limited to plaintiffs who are threatened within the area of danger.[8] Rather, an analogy could have been directed to those cases where a statutory duty has been breached, which might possibly point to a different result.[9] Clearly, such a conception of duty in a personal injury case based on defendant's negligence is unsatisfactory as *ratio decidendi*.

Second, the issue of proximate cause was treated in a manner which is quite conventional and supported by a great deal of authority, viz.,

> "The proximate cause of injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred . . . these defendants ought reasonably to have anticipated that, by their negligence . . . serious injury would result to *some one.*"

But like all such definitions of proximate cause, this treatment cannot be altogether clarifying or satisfying, since the terms themselves require definition. The term "proximate" is ambiguous.[10] It has connotations of nearness in time or space which are not necessarily proximate in a legal sense. The word "natural" would seem to refer to consequences which are not extraordinary, not surprising in the light of ordinary experience. Yet, it is conceivable a wrongdoer may foresee an extraordinary departure from the usual course of nature. It is in effect what is known as the "but for" or "*sine qua non*" rule, which is merely one of exclusion and which will explain the greater number of cases, but fails where two causes concur to bring about an event and either one alone would cause the injury.[11] Contrary to the modern tendency to use the test of foreseeability to de-

[8]Klepsch v. Donald (1892) 4 Wash. 436, 30 P. 991.

[9]RESTATEMENT, TORTS, §286 reads: "The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
(b) the interest invaded is one which the enactment is intended to protect; and,
(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and,
(d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining the action."

[10]"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," Andrews, J., dissenting in the Palsgraf case, supra note 2.

[11]The Restatement of Torts uses the preferable term, "substantial" cause.

termine the existence of negligence, such a rule would use it to limit proximate cause.[12] Used in such manner, it may become a mere play upon words by the rule that it is not necessary that the wrongdoer should anticipate the precise injury.[13] Surely, a jury and lawyers too, may be confused by such a definition.[14] In the ordinary negligence case, where the duty may be readily assumed and is clear, such criticisms may not be so weighty; it may be difficult, if not impossible to frame an all-inclusive test for proximate cause. Satisfactory results will generally be reached where the standard is not otherwise too clear by the margin of discretion reposed in juries. However, foreseeability as a study in duty is always necessary in the law of negligence; it is not always necessary in the law of proximate cause once the duty has been established. It is, therefore, indefensible to treat a case as one in proximate cause when it should be considered as a study in duty or vice versa.

It is not clear, therefore, that correct results will be obtained where, as in the *Mize* case, it might reasonably be contended that the defendant could not reasonably anticipate consequential injury to B, though harm was patent as to class A. In such a case it would be simpler and less confusing to state the problem in terms of duty. To deal with the problem in terms of causation or to talk of proximateness obscures the issue; namely, *is the defendant under a legal obligation to protect the plaintiff's interest?*[15]

Illustrative of how a court may confusedly treat an issue of duty in terms of proximate cause and reach a strained result, is the typical case of *Hoag* v. *Lake Shore Railway Company*.[16] In that case, defendant's servants ran a train of cars loaded with oil into a slide which obstructed the track. Some of the cars were derailed and burst; the oil ignited and ran down a swollen stream, and destroyed plaintiff's property some three or four hundred feet below, for which plaintiff sued. The Court decided as a matter of law that defendant's negligence was not the proximate cause of the damage. Surely the Court erred in assuming causal relation was involved. *Causal connection was too clear for doubt.* Whether this was such a hazard against which plaintiff's interest was protected was perhaps the only

[12]38 AM. JUR., *Negligence*, §58. See Therriault v. England (1911) 43 Mont. 384, 116 P. 581.
[13]Reino v. Mont. Mineral Develop. Co. (1909) 38 Mont. 291, 99 P. 853.
[14]See McNair v. Berger (1932) 92 Mont. 441, 15 P. (2d) 834.
[15]But a court may possibly deal with the question intuitively. Thus, the maxim, supra, is based upon a relational concept of negligence.
[16](1877) 85 Pa. 293, 27 Am. Rep. 653.

real issue."[17] Again, referring to the facts of the *Mize* case, *supra*, it could well have been said there that, "The law of causation, remote or proximate, is foreign to the case before us."[18] As stated in the Restatement of Torts, viz.[19]

> "If a defendant's conduct, although involving a realizable and unreasonable risk of causing harm to certain classes of persons, involves no such risk of harm to any class of persons of which the plaintiff is a member, the fact that it causes harm to the plaintiff cannot make the defendant liable to him, and this is so, although the causal relation between his conduct and the harm is sufficient to make it the legal cause of the harm. . . "

The issue was presented in striking fashion in the *Palsgraf* case. The facts established that the plaintiff was standing on defendant's railway platform. A train guard, in assisting a passenger to board the train, dislodged a package from his arm and it fell upon the rails and exploded. Nothing in the appearance of the package gave notice that it contained fireworks. The concussion threw down some scales many feet away, injuring the plaintiff. Justice Cardozo, in the majority opinion, approached the problem as a study in duty and placed the decision squarely upon the principle that defendant was not negligent toward the plaintiff who did not come within the zone of apprehended danger. In such cases, negligence, he said, like risk, is a term of relation between the plaintiff and defendant which must be founded upon anticipation of harm to the plaintiff, viz.,

> "What the plaintiff must show is a wrong to herself, i.e., a violation of her own right, and not merely a wrong to some one else. . . . The risk reasonably to be perceived defines the duty to be obeyed. . . . Negligence in the abstract apart from things related is surely not a tort."

In a dictum, he suggested that if only injury to plaintiff's property might be foreseen, there could be no recovery for injuries to his person which might result.

Justice Andrews, speaking for the minority, held that the fact that the event could not have been foreseen was immaterial, following the view of the English courts.[20] He contended

[17]See Green, *Rationale of Proximate Cause* (1927) §4 and cases analyzed therein. Bingham, *"Legal Cause" at Common Law*, 9 COL. L. REV. 153 (1909).

[18]Cardozo, J., in the Palsgraf case, supra note 2.

[19]§430, Comment b.

[20]"When negligence is once established, the defendant is held for all natural consequences." Smith v. London & S. W. Ry. Co. (1870) L. R. 6 C. P. 14, cited by Andrews, J.; but see a later case, Bottomley v. Bannister (1932) 1 K. B. 458 wherein it was said, "It is a common-

that, viz.,

> "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone. . . . Everyone owes the world at large the duty of refraining from those acts which unreasonably threaten the safety of others. . . . Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. . . . We deal in terms of proximate cause, not of negligence."

Substantially, Justice Andrew's analysis appears to be the view of the Montana Court; that there is in effect an absolute wrong.

A comparison of these two views shows that they are the result of different conceptions as to the nature of negligence. The correctness of the competing doctrines would seem to depend upon how far one should be held for unsocial conduct in relation to the harm caused,—as to whether negligence is the relationship between the actor and those whom he does in fact injure; or is that between the actor and the person whom he might reasonably expect his act would injure.

Justice Cardozo's conception is more in accord with the generally accepted basic theory of negligence, that it consists in exposing another to an unreasonable risk. If defendant's wrong creates a risk, his liability should be bounded by that risk.[21] It is much easier of application as it avoids the "rough sense of justice"[22] implicit in the usual proximate cause rule by confining defendant's responsibility within definite bounds, which is desirable, for a defendant may be penalized unduly where his negligence consists of a momentary inadvertance or an honest error of judgment, and the harm caused is of a kind entirely different from that foreseen.[23] Logically, such a view

place of the law of negligence that before you can establish liability for negligence, you must first show that the law recognizes some duty towards the person who puts forward the claim." Winfield in his article, *Duty in Tortious Negligence*, 34 COL. L. REV. 66 (1934), examining English law, believes the idea of duty may be eliminated from the tort of negligence, but he admits it is embedded in English law and is likely to stay there.

[21]Seavey, *Mr. Justice Cardozo and the Law of Torts*, 53 HARV. L. REV. 386 (1939); 39 COL. L. REV. 34; 48 YALE L. REV. 404.

[22]Andrews, J., in the Palsgraf case, supra.

[23]For example, the owner of a dog, known to be vicious who would be liable without fault if it bit a person after escaping, is not liable to a person whom the dog clumsily knocks down, since the risk created by the dog was only that of being bitten. Koetting v. Conroy (1936) 223 Wis. 550, 270 N. W. 625. See RESTATEMENT, TORTS, §468 to the effect that, "The fact that the plaintiff has failed to exercise reason-

would seem to be irrefutable, for if defendant could not reasonably have foreseen any harm, there is no negligence and, if not, no tort liability.

On the other hand, the tenet of a broad duty, as adopted by the minority, has arguments in its favor. It is felt that there are unforeseeable harms that should not go uncompensated. There is a certain inconsistency in holding that one who can foresee harm to A is liable for unforeseen consequences to A, and refusing to hold him for unforeseen harm to B..[24] It is objected that the view of Justice Cardozo may give the court too great control of the case and take it away from the jury to the prejudice of the plaintiff.[25]

Which view is most commendable from the standpoint of social policy is hard to answer. Defendant, as one who has departed from the social standard, may preferably be held to bear loss than an innocent plaintiff, but liability is generally thought to be based upon fault.

Justice Andrew's view does not accord with the rulings of the United States Supreme Court that breach of a railway's duty to one class of persons creates no liability in favor of another;[26] nor with those cases holding that only those covered

able care for his own safety does not bar recovery unless the plaintiff's harm results from a hazard because of which his conduct was negligent." See also, Cosgrove v. Schusterman (1942) .....Conn....., 26 A. (2d) 472, which attempts to line up previous Connecticut decisions with the Restatement, saying the particular hazard rule operates within a restricted field, since the same circumstances which might involve its application may make possible a solution of the question of liability by application of the principles of proximate cause. But query, whether such cases could not be better decided under the hazard theory?

[24]See Gregory, *Proximate Cause in Negligence—A Retreat from Rationalization*, 6 UNIV. CHI. L. REV. 36 (1938).

[25]On the other hand, would vexatious litigation be more common if there were no necessity of finding a duty, because the burden of proof on the plaintiff would be less? See Winfield, *Duty in Tortious Negligence*, supra, p. 64. Dean Smith, in a footnote to Professor Winfield's article, makes the observation that, "If the question of duty and negligence might be dealt with under the heading of negligence alone, the entire issue would become a jury question. Whereas, if the question of duty is dealt with by the courts and only the question of negligence is left to the jury, the outcome of litigation might be quite different. Your suggestion that the power of the judge to control the jury by directing a verdict or non-suiting the plaintiff on the question of negligence would obviate this difficulty, does not seem to me to be a satisfactory answer to the problem in the United States, for the reason that in this country the judge can direct a verdict only when reasonable men could not differ as to whether the conduct of the defendant constituted negligence."

[26]Chesapeake & Ohio Ry. Co. v. Nixon (1926) 271 U. S. 218, 46 S. Ct. 495.

by a statute may take advantage of its breach.[27] It has long been recognized that for tort liability based upon breach of statutory duty, the legislative intent must have been to protect plaintiff as an individual or as one of a class, that the intent be to protect the particular interest on which he sues, and that the violation of the statute proximately cause his injury or damage. A landlord is under no duty to keep his premises safe for a trespasser. Thus, the analogies in tort law favor the application of the doctrine of Justice Cardozo. Insofar as Justice Andrew's view envisages a duty to the whole world, it is contrary to the majority of the cases.

Powerful support to Justice Cardozo's view was given in the case of *Sinram* v. *Pennsylvania Railway Company*[28] wherein it was said, viz.,

> "Absolute liability for certain kinds of trespass remains; . . . Indeed this may be the path which the law of torts is destined to follow led by the conceptions underlying Workmen's Compensation Acts. But so long as it is an element of imposed liability that the wrongdoer shall in some degree disregard the sufferer's interests, it can only be an anomaly, and indeed vindictive, to make him responsible to those whose interests he has not disregarded. . . . Our duties are a resultant not only of what we should forecast, but of the propriety of disregarding so much of it as our own interests justify us in putting at risk. It must be confessed, therefore, that the standard so fixed (the usual test) scarcely advances the solution in a concrete case; it only eliminates the egregious, leaving the tribunal a free hand to do as it thinks best. But that is inevitable, unless liability is to be determined by a manual mythically prolix, and fantastically impractical."

It must be pointed out, however, that as might be expected from the part intuition may play in a judicial decision, the same result might in a particular case be reached under either the foregoing majority or minority rule of the *Palsgraf* case, by calling the injury remote or the risk not unreasonable. Thus, in the *Mize* case, under the theory of Justice Cardozo, it is not certain that a different result would have been reached. It might be held that the power company should foresee that elec-

[27]Exner v. Sherman Power Con. Co. (C. C. A. 2d, 1931) 54 F. (2d) 510; Ball Ranch Co. v. Hendrickson (1915) 50 Mont. 220, 146 P. 276.

[28](C. C. A. 2d, 1932) 61 F. (2d) 767. A tug owner's liability to a barge owner for collision was held irrelevant on the question of liability to the cargo underwriter, as there was no violation of any duty to him, since the tug owner could not be required to have foreseen the unlikely conduct of the bargee in loading the barge and failing to beach it.

tricity will go wherever there is a wire to carry it and that the area of risk, being one to the general public as a class, is wide enough to include the plaintiff; moreover, that the imminently dangerous character of electricity imposes a standard of care and duty or prevision not far from that of an insurer. Such an observation does not make Justice Cardozo's rule less attractive, but would serve to emphasize its simplicity of approach and ease of administration, and the uncertainty which attends the manipulation of proximate cause with its "practical politics."[29]

A review of the cases shows that of those courts which have considered the duty problem expressly, many have held that there is no duty to one to whom no harm can be foreseen.[30] Fewer have held to the contrary.[31] The majority of cases continue to use the language of proximate cause. The thesis advanced by Justice Cardozo has been expressly adopted[32] and cited approvingly in a growing number of courts. The Restatement of Torts has accepted it fully.[33]

As has often been remarked before, it is surprising what can be discovered by a reading of the cases. It is remarkable that the *Mize* case is probably the only one before the Montana Court which fairly raised the question of the unforeseeable plaintiff outside of the area of risk.[34] In deciding it, Justice Holloway proved himself a discerning judge in not allowing the decision to turn solely on the general and undefined statement of prox-

[29]Andrews, J., in the Palsgraf case, supra note 2.

[30]Goodlander Mill Co. v. Standard Oil Co. (1894) 63 F. 400, 27 L. R. A. 583; Boyd v. City of Duluth (1914) 126 Minn. 33, 147 N. W. 710; Trinity & B. R. Co. v. Blackshear (1915) 106 Tex. 515, 172 S. W. 544; Garland v. Boston & Maine R. R. (1913) 76 N. H. 556, 86 A. 141; Loughlin v. Johnson (1937) 89 N. H. 191, 195 A. 685; Karr v. Chicago R. I. & P. Ry. Co. (1937) 341 Mo. 536, 108 S. W. (2d) 49; Barrus v. Western Union Tel. Co., supra note 2.

[31]Mize v. Rocky Mountain Bell Tel. Co., supra note 2; Wilson v. No. Pac. Ry. Co. (1915) 30 N. D. 456, 153 N. W. 429; Hollidge v. Duncan (1908) 199 Mass. 121, 85 N. E. 186, 17 L. R. A. (N. S.) 982.

[32]Sinram v. Pennsylvania Ry. Co., supra; Waube v. Warrington (1935) 216 Wis. 603, 258 N. W. 497, 98 A. L. R. 394.

[33]§281.(c). "If the actors conduct creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured." Cited in support in Goyette v. Amor (1936) 294 Mass. 355, 2 N. E. (2d) 219, 220; Harris v. Lewistown Trust Co. (1937) 326 Pa. 145, 152, 191 A. 34; Pilvelis v. Plains Twp. (1940) 140 Pa. Super 561, 14 A. (2d) 560.

[34]Those cases do not seem anomalous in which a rescuer is allowed to recover against one who imperils the rescued. Bracey et al. v. Northwestern Improvement Co. (1910) 41 Mont. 338, 109 P. 706. See Kelly v. Lowney & Williams (1942) .....Mont....., 126 P. (2d) 486, where it was held that a woman could recover for fright without physical impact.

imate cause all too current in decisions of that period. He foresaw that legal duty was a necessary antecedent to liability for negligence. The more searching analysis of the last forty years into this branch of "Everyman's Law" however, if this study is correct, indicates that such a case should be squarely decided upon the question of legal duty alone. It is hoped that the Montana Court will have opportunity to re-examine the question when the facts warrant in the light of a general recent tendency to consider many cases formerly decided in the law of proximate cause as presenting more properly an inquiry into the subject of legal duty.

—John D. McKinnon.

RECOVERY FOR NERVOUS INJURY CAUSED BY NEGLIGENCE WITHOUT IMPACT

On three occasions the attention of the Montana Supreme Court has been directed to the question of tort liability for mental or nervous injury caused by negligence where there has been no contemporaneous physical impact upon the person of the plaintiff. In 1909, the court, in sustaining a special demurrer for uncertainty to a complaint, indicated that "The right was with the defendants of having the plaintiff allege specifically whether she claimed damages as the result of physical injuries and mental disturbance, or the latter alone, so that they might prepare for trial."[1] Again in 1934 in *Cashin v. Northern Pacific Ry Co.*[2] the question was before the court; the court held that plaintiff may recover for physical injury caused by the defendant's negligent conduct even though there was no contemporaneous physical contact. The latest Montana pro-

[1]Hosty v. Moulton Water Co. 39 Mont. 310, 102 P. 568.

[2]96 Mont. 92, 28 P. (2d) 862. Plaintiff lived near the railroad tracks of defendant in a mountainous area where rocks threatening the safety of the railroad grade were from time to time removed by blasting. Without notice to the plaintiff, whom defendant knew to be a woman of nervous temperament, defendant set off a charge of dynamite shattering glass in the Cashin home and prostrating the plaintiff, causing physical injury induced by the shock. In giving judgment for the plaintiff, the Court said, "Often the physical injury caused by the wrecking of the nervous system is more serious and lasting than the breaking of bones or the tearing of flesh, and, where it is clearly shown that such injury was suffered and was proximately caused by the negligent act of the defendant, a cause of action exists for damages for the resulting injury, and stands on a more firm foundation of reason than does that class of cases wherein it is held that the plaintiff must have been physically battered, 'although slightly', in order to recover for fright or mental distress."