CAUSAL RELATION IN LEGAL LIABILITY—IN TORT*

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The composition of a case in tort is more complex than has been generally supposed. The assumption by courts and legal writers that a tort is made up only of the elements of wrongdoing, causal connection and damage has led to no end of confusion in the development of this branch of the law. While the causal relation and damage elements are acceptable and usable terms, the so-called wrongdoing element is too comprehensive, and tends to obscure the real process to which a supposedly tort case must be subjected before responsibility can be determined. The stubborn unity of a tort case demands a more searching analysis than this term affords, and as desirable as simplicity may be, it is disastrous to clear thinking and the law's development to crowd too many concepts into an expansible catchword.

In any tort case all of the following inquiries arise. Any one or more of them may present difficult problems. But it is seldom that more than one or two of them give trouble in a particular case.

(1) Is the plaintiff's interest protected by law, *i. e.*, does the plaintiff have a right?

(2) Is the plaintiff's interest protected against the particular hazard encountered? [1]

(a) What rule (principle) of law protects the plaintiff's interest?

(b) Does the hazard encountered fall within the limits of the protection afforded by the rule?

(3) Did the defendant's conduct violate the rule which protects the plaintiff's interest? [1a]

(4) Did the defendant's violation of such rule *cause* the plaintiff's damages?

(5) What are the plaintiff's damages?

Phrased in terms of requisites, a tort comprehends: (1) an

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[1] This inquiry presents several phases, and further subdivisions might well be added as follows:

(c) Does the plaintiff's conduct defeat the protection afforded?

(1) consent; (2) contributory negligence; (3) assumed risk.

(d) Is the defendant's conduct privileged?

But in order not to encumber the analysis with too great detail, consideration of these is omitted.

[1a] The term "wrongdoing" is not objectionable if used only to indicate the quality of the defendant's conduct, and whenever used hereinafter will be restricted to this meaning.

interest protected; (2) against the particular hazard incurred; (3) by some rule of law; (4) which the defendant's conduct violated; (5) thereby causing; (6) damages to the plaintiff. These inquiries or requisites are stated in the order of their seeming importance rather than in the order they would be considered procedurally, though the differences are minor ones. They will be considered, as far as possible, separately, and in dealing with each, for the purposes of making it decisive of any particular case, it will be necessary to assume that all the other inquiries would be concluded favorably to the complaining party if they were reached.

It will be observed that the first two of these inquiries are problems for the court, while the last three are primarily for the jury—so-called questions of law as opposed to questions of fact. As will be developed later the apportionment of these problems in some cases to judge and jury is a source of considerable difficulty and accounts for many serious blunders.

It is well enough to state in advance that the first and second inquiries are of prime importance. Broadly speaking, little attention has been given to them and while they are pertinent to every case, they have remained largely inarticulate or else have been confused with the relatively minor fact problems of the quality of the defendant's conduct, causal connection and damages, represented by the last three inquiries. Especially has the latter been done with regard to the problem of causation. Although it is at all times and in all cases a pure question of fact—the simplest element of legal liability—the abortive efforts which have been made to solve the inquiries of prime importance in terms of causal connection cannot be exaggerated. The deplorable expenditure and stupendous waste of judicial energy which has been employed in converting this simple problem into an insoluble riddle beggars description. Only by a patient process of eliminative analysis can the rubbish of literally thousands of cases be cleared away.

IS THE INTEREST PROTECTED

The interests protected by rules of law classified under the general head of Torts are numerous. They include all those rights of personality, rights of property and rights of economic advantage and opportunity which in turn form the basis of further classification under the familiar catch-words of assault, battery, false imprisonment, negligence, trespass, conversion, fraud and deceit, malicious prosecution, slander and libel and interference with advantageous relations in numberless variations. Even this is not a complete classification. Additional claims, wants or desires (which may be termed interests) of

individuals or groups have from time to time been recognized by being given protection, and when so recognized became *rights* subject to classification under the headings indicated. This process still continues. The recognition of these interests is one of the most important functions of courts. But in any given case whether an interest shall be given recognition seldom presents itself with boldness. Most frequently the complaining party invokes some well established rule as affording protection to his injured interest and the court merely extends the rule to cover the interest involved. Thus the law grows. Most interests to which the law gives protection are well recognized.[2] The interests of importance to which the law refuses protection altogether are very few. On the other hand, the fullest degree of protection is rarely, if ever, extended to any interest. Consequently at the foundation of every lawsuit this problem of interests must necessarily arise. It offers no difficulty except in those cases where the claim to recognition is not well settled. In the following cases the solution of this problem was decisive, but most of the opinions give no indication that it was recognized.

In *Drobner v. Peters*,[3] recovery was sought for injuries negligently inflicted upon a child before birth. The question was whether the interest asserted is protected by law. The court denied recovery on the ground that the defendant owed no duty of care to the unborn child with reference to its bodily welfare. In short, the child had no right to freedom from bodily harm.[4] The determination of this inquiry disposed of the case. It was unnecessary to inquire whether the defendant was negligent or otherwise a wrongdoer, what the damage was, or whether there was a causal relation between the two.

In *Wilson v. Brown*,[5] recovery was sought by children against their stepfather for the killing of their mother. It was denied because no recognition of such an interest was given at common law and the statute permitting a recovery for injuries resulting from death by wrongful act did not cover such a case inasmuch as the mother, if she had lived, could have had no protection by way of damages against her husband, the defendant, for the bodily harm inflicted upon her. A like result would follow in a suit by a child to recover against a third person for seducing its mother, thereby bringing disgrace upon it and its family name. The law gives no protection to such an interest.

In *Stiffler v. Boehm*,[6] the plaintiff sought to recover damages against the defendant for enticing away and alienating the affec-

[2] CARDOZO, THE GROWTH OF THE LAW (1924) 60.

[3] 232 N. Y. 220, 133 N. E. 567 (1921).

[4] Although it was conceded that an unborn child is given protection as to its property interests.

[5] 154 S. W. 322 (Tex. Civ. App. 1913).

[6] 124 Misc. 55, 206 N. Y. Supp. 187 (1924).

tions of the plaintiff's fiancee, thereby causing a breach of contract to marry. Recovery was denied. The only basis for such a decision is that no recognition is given the interest the suitor may have in such a relation. No protection is afforded against the risk of another's interference in such matters, whatever the motive may be. This is true even though the third person debauches or seduces the promised wife.[7]

Likewise, a minor child is denied recovery for personal injuries caused by the negligence of a parent.[8] But, under the interpretation of a statute affecting the status of married women to contract, it has been held that a wife may sue her husband for assault and battery,[9] and even for personal injuries caused by his negligence, thus giving recognition to an interest theretofore denied under the common law.[10] Very similar statutes have been construed otherwise.[11]

In a suit for damages because of the failure to deliver a death message preventing the sendee from attending the funeral of a near relative, the important question for determination is whether the plaintiff's interest is recognized and protected by the law of the particular jurisdiction.[12]

In *Pasley v. Freeman*,[13] the defendant, intending to deceive the plaintiff, falsely represented to him that certain persons were entitled to credit in the purchase of goods. Relying on the representations, the plaintiff extended the credit but the purchasers were unreliable and unable to pay. The plaintiff sought to hold the defendant for the loss suffered. The court's problem was to determine whether the plaintiff's interest was protected. The court so held, and the law of deceit was greatly expanded and enriched.

In *Lumley v. Gye*,[14] the defendant interfered with a contract relation between the plaintiff and Miss Wagner under which the latter was engaged to perform at the plaintiff's theatre. The question was whether there was any protection for an interest of this nature. The court held there was, and protection given this sort of interest has been expanded enormously as a result of the decision.

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[7] Davis v. Condit, 124 Minn. 365, 144 N. W. 1089 (1914); see (1925) 10 CORN. L. Q. 259; (1925) 25 COL. L. REV. 229; Homan v. Hall, 102 Neb. 70, 165 N. W. 881 (1917); Ablerman v. Holman, 208 N. W. 889 (Wis. 1926).

[8] Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923).

[9] Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206 (1920).

[10] Bushnell v. Bushnell, 131 Atl. 432 (Conn. 1925); Roberts v. Roberts, 185 N. C. 566, 118 S. E. 9 (1923); see (1925) 38 HARV. L. REV. 383.

[11] Thompson v. Thompson, 218 U. S. 611, 31 Sup. Ct. 111 (1910).

[12] Mentzer v. Western Union Tel. Co., 93 Iowa, 752, 62 N. W. 1 (1895); see 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) 474.

[13] 3 D. & E. 51 (K. B. 1789).

[14] 2 El. & Bl. 215 (Q. B. 1853).

In *Chasemore v. Richards*,[15] it was held that one land owner had no protection against another who should draw off or intercept subterranean or percolating waters, and this is the orthodox common law rule. Other courts have extended protection to such an interest.[16]

On the other hand, in *Rylands v. Fletcher*,[17] it was held that a landowner may recover against a neighbor who brings upon his land dangerous agencies which may escape and do harm to the adjoining premises. In this case there was a large reservoir of water stored by Rylands which escaped and flooded Fletcher's mines. Protection was extended to the plaintiff's interest irrespective of negligence on the part of the defendant. The rule is not universally accepted.[18]

In *Ashby v. White*,[19] the plaintiff brought an action for being deprived of his vote. Whether his interest in exercising this privilege of citizenship was to be given the law's protection was the only issue involved, but the judges successfully submerged it with minor considerations. The political complexion of the House of Lords finally gave it the law's recognition.

In an action for damages on account of fraudulent representations whereby the plaintiff has purchased land or goods, some courts restrict the damages to the difference between the market value and the price paid. Other courts allow the difference between the value of the property when purchased and its value if the property had been what it was represented to be. In the one case the plaintiff's interest in a good bargain is refused protection.[20] In the other, protection is given.[21]

Many of these cases are landmarks in the law of Torts. They, and others like them, represent big steps in the growth of the law. The problem was the same in all of them. Its recognition and determination was decisive. Considerations of damage, cause and excuses would have been wholly impertinent until this point was settled.

There are numerous cases like these.[22] Under whatever guise such a problem may present itself in the first instance, its recognition and favorable determination for the plaintiff marks an outpost of the law, one of the limits to which the law has developed. Of course, *how* a court shall know the solution of

[15] 7 H. L. Cas. 349 (1859).

[16] Meeker v. East Orange, 77 N. J. L. 623, 74 Atl. 379 (1909).

[17] L. R. 3 H. L. 330 (1868).

[18] See Bohlen, *The Rule in Rylands v. Fletcher* (1911) 59 U. PA. L. REV. 298, 373, 423.

[19] 2 Ld. Raym. 938 (K. B. 1703).

[20] Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39 (1889); George v. Hesse, 100 Tex. 44, 93 S. W. 107 (1906).

[21] Morse v. Hutchins, 102 Mass. 439 (1869).

[22] Edison v. Edison Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907); Roberson v. Rochester Box Co., 171 N. Y. 538, 64 N. E. 442 (1902).

such a problem when recognized is an inquiry which involves the highest law-making function. Let it suffice at this point that the problem is an open one in every case and is not soluble by any *a priori* formula.

THE LIMITS OF PROTECTION

It will be observed that the second inquiry (Is the plaintiff's interest protected against the particular hazard encountered) is but a particularization of the more general inquiry of the preceding section. It presents the same kind of problem except that it is more complex and arises with greater frequency. It is believed to demand more of the judicial function than any other problem involved in the administration of justice. The law never gives complete or absolute protection to any interest. The problem therefore is in any case whether the particular hazard falls within the radius of protection thrown about the interest. It will readily appear that the inquiry is neither single nor simple. First, it is necessary to know what rule or rules of law protect the injured interest. The plaintiff usually determines this by invoking some rule which protects the interest. It may or may not be an appropriate one. If for any reason the plaintiff should not invoke a rule appropriate for vindicating the injury, his mistake would be a fatal one under most systems of pleading. This phase of the problem would always present itself as a pleading problem if pleading were an exact process. But pleading, when rightly considered, being only a preliminary process by way of introducing a case to the court, it is conceivable that this sort of blunder may not become apparent until after the case had been fully developed. Under liberalized systems of pleading there is slight occasion for denying relief to a party who has merely invoked the wrong remedy or who has mistaken the theory of his action.

But assuming that the most efficacious rule of law for vindicating a particular interest which has been injured by the hazard of the defendant's conduct has been invoked, or that the court gives the plaintiff the benefit of such rule, the difficulties have only begun. The hazards to which any interest is subjected are so numerous, and the reach of any rule which the plaintiff may invoke in its vindication is so poorly defined, and there are so few external guides to tell a court whether a particular hazard is within the range of the rule invoked, that the problem may well prove bewildering. Nevertheless, the court must determine it in every case, consciously or otherwise. The judicial power cannot function in any other way. It is a problem solely for the judge and the jury has no part to play in its determination. It is at this point that the law-making function of courts is most frequently employed. It is here that the great bulk of what we

call law—the aggregate of legal rules with their limitations—is built up. Just as the courts extend the law in the recognition of interests which have been thought to be worthy of the law's protection, so in defining the *limits* of that protection they exercise an equally expansive power. And the process is applicable to interests recognized by legislative authority in exactly the same manner. An interest having been recognized as worthy of protection, *how much* protection shall it be given? Against *what* risks shall it be protected? What are the *limits* of the rule invoked? Does the rule afford protection against the hazard which has produced the injury? This is the exact inquiry. The rule, therefore, must be explored, surveyed, bounded, before the inquiry can be answered. Fortunately, or unfortunately, there is no way in a developing society by which this inquiry can be determined in advance of the particular transaction which calls for the application of the rule. The rule is a general principle, without bounds, until judicial determination of particular cases gives it such. Even then, it is never definitely bounded, for in the next case the boundaries may be shifted one way or the other by the fixing of an outlying point at a slightly different location. The most thoroughly explored and developed rule is without exact boundary and since conflicts between the multitudes of interests now recognized, as well as those being given recognition from time to time, are constantly arising, the boundaries of the rules which protect such interests are subject to constant readjustment. In making such adjustments, and in the recognition of risks as falling within the bounds of those rules, the courts fashion the law. There are numerous cases in which it is clear that the court did not recognize the problem as being a decisive one, or if recognized, it was not candidly met. The attempts which have been made to translate this problem into terms of causation and damage have not made the solution any easier; on the other hand, they have greatly obscured the problem. An attempt is here made to analyze and discuss a large number of what have been thought to be difficult cases in order to indicate the path which it is believed leads to a rational conception of the problem and its solution.

In *Bird v. Jones*,[23] the defendant erected seats across a public highway which was enclosed for a boat race. The plaintiff was prevented from passing into the enclosure and along the highway by agents of the defendant. He sought to recover under the theory of false imprisonment. A divided court held that he had no protection under the rule invoked,[24] though he might have had under another rule.

[23] 7 Q. B. 742 (1845).

[24] Under a Texas statute such a partial obstruction of one's right of freedom from interference with his choice of location is so protected. Penal

In *Derry v. Peek*,[25] the plaintiff sought to hold the directors of a certain company liable in damages for fraudulent representations which induced the plaintiff to purchase shares in the company. The defense was that the representations were made in good faith and upon reasonable grounds. The court was called upon to determine whether the rule invoked gave protection against representations made in good faith. It held not and thereby limited the boundaries of deceit to actual fraud as distinguished from innocent misrepresentation. Other courts have not so defined the boundaries of the rule.[26]

In *Swift v. Rounds*,[27] the defendant bought goods of the plaintiff on credit. Nothing was said by the defendant on the subject of his ability or intention to pay for them. The plaintiff sought to recover on the basis of deceit, alleging that the defendant's application to purchase was a representation that he intended to pay, when in fact he had no such intention, but fraudulently intended to cheat the plaintiff out of the value of such goods. The court's problem here was to determine whether the plaintiff's interest was within the protection of the particular rule of law invoked. The court so held and thereby extended the protection given against such risks by the action for deceit.

In *Fottler v. Moseley*,[28] the defendant, in order to induce the plaintiff not to sell his stock in a certain company, represented that certain sales being made on the market were *bona fide*. The plaintiff held his stock and an officer of the company embezzled a large amount of the funds of the corporation and absconded. The plaintiff sought to recover the loss in value of his stock caused by the defalcation of such officer, and the principal question involved was whether this was a risk incurred by the defendant by reason of his conduct. Was the plaintiff's interest protected against such a risk as this? The court held that it was.

In *Work v. Campbell*,[29] the plaintiff sought to recover in an action of deceit against the defendant for having made false charges against her husband on account of which the plaintiff separated from her husband and caused him to leave the country. The problem was to determine whether her interest was protected against such a risk, and the court held that it was.

In *Wells v. Cook*,[30] the plaintiff, as agent of his brother, pur-

Code 1895, art. 618; Gold v. Campbell, 54 Tex. Civ. App. 269, 117 S. W. 463 (1909).

[25] 14 App. Cas. 337 (1889).

[26] Aldrich v. Scribner, 154 Mich. 23, 117 N. W. 581 (1908); French Piano Co. v. Gibbons, 180 S. W. 1185 (Tex. Civ. App. 1915).

[27] 19 R. I. 527, 35 Atl. 45 (1896).

[28] 185 Mass. 563, 70 N. E. 1040 (1904).

[29] 164 Calif. 343, 128 Pac. 943 (1912).

[30] 16 Ohio St. 67 (1865).

chased sheep from the defendant who represented them sound and healthy. The plaintiff later purchased all of his brother's sheep including those received from the defendant. Due to the diseased condition of the sheep purchased from the defendant, the entire flock became infected. The plaintiff sought to recover damages of the defendant in an action of deceit. The court denied recovery on the ground that the misrepresentation was not made to the plaintiff. The protection of the rule at the basis of deceit was not extended to cover a hazard of this sort. The court said: [31] "It is simply impossible that municipal law should take cognizance of all these consequences. . . . If this limit is to be extended it must be the work of the legislature." The problem was not one of causation for which it has been so often mistaken, but one of defining the boundaries of the rule invoked.[32]

In *Wetmore v. Mellinger*,[33] the plaintiff sued the defendant for having maliciously prosecuted a civil action against the plaintiff. No recovery was allowed. The interest which one has in not being harassed by a civil suit is not protected except there be a special injury to person or property. Under the orthodox rule a defendant runs no risk in such a case save the payment of court costs.[34] But some courts extend additional protection to such an interest against this risk.[35]

The common law of England gave no protection to a woman against verbal imputations of unchastity, unless such imputations fell within the narrow categories for which an action for slander would lie generally. In *Cooper v. Seaverns*,[36] the Kansas court in such a case chose to expand the rule so as to protect such interest fully. The Texas court did the same thing by invoking an article of the Penal Code.[37]

In *Schoepflin v. Coffey*,[38] the plaintiff sought to recover damages for both slander and libel. It was held that the words spoken were not actionable *per se*, that is, the interest of the plaintiff was not protected against such a risk in the absence of further facts, to wit, special damages. In the libel action it appeared that the words spoken by the defendant had been pub-

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[31] At 74.

[32] For further delineation of the rule, see Tindle v. Birkett, 171 N. Y. 520, 64 N. E. 210 (1902); Hindman v. First Nat'l Bank, 112 Fed. 931 (C. C. A 6th, 1902). The same problem, though involving very different circumstances, is present in Enfield v. Colburn, 63 N. H. 218 (1884).

[33] 64 Iowa, 741, 18 N. W. 870 (1884).

[34] Pye v. Cardwell, 110 Tex. 572, 222 S. W. 153 (1920). Inability to recover against witnesses who have given perjured testimony presents a similar situation. Hocker v. Coelti, 239 Ill. App. 392 (1926); see 24 L. R. A. (N. S.) 265.

[35] Eastin v. Stockton Bank, 66 Calif. 123, 4 Pac. 1106 (1884).

[36] 81 Kan. 267, 105 Pac. 509 (1909).

[37] Hatcher v. Range, 98 Tex. 85, 81 S. W. 289 (1904).

[38] 162 N. Y. 12, 56 N. E. 502 (1900).

lished in a newspaper by parties who heard the words spoken, but that the defendant had nothing to do with such publication. Recovery was denied in this action for lack of "proximate" cause. The real basis for denying recovery is that the rule at the basis of an action for libel affords no protection against the risk of a voluntary repetition of the defamatory statement. Such rule of law does not depend upon causal relation, but is based upon the court's determination of sound policy. The courts have so restricted the operation of the rule as a matter of law. Many factors aside from causal relation entered into its delimitation.

In *Vicars v. Wilcocks*,[39] the defendant, in order to procure the plaintiff's discharge, wrongfully accused him of having cut certain cordage of his employer. The accusation fell short of charging a crime. Having been discharged, the plaintiff sought to recover against the defendant for his wrongful discharge in an action of slander. The court denied recovery because not a "natural consequence" of the defendant's wrong. This is not sound. Causal connection was both actual and "natural." But the court thought that to give a recovery would expand the action of slander beyond reasonable bounds. The result of the decision is that protection was denied the interest of the plaintiff; the risk is not one within the protection of the rule at the foundation of an action of slander. This early decision has stunted the growth of the action for slander and embarrassed the development of legal liability generally.

In *Lynch v. Knight*,[40] the wife, joined by her husband, brought suit against the defendant for having uttered such base defamatory remarks about her that her husband put her away. Recovery was denied because the special damage was insufficient; the action of the husband in putting her away was not a reasonable consequence of the slander. No such reasons are sustainable. The court simply refused to extend the protection of the rule of law to cover such a risk. The plaintiff's interest was not thought to be entitled to protection against this sort of risk.[41]

In the widely known "squib case" [42] the sole problem was whether a recovery could be based upon the legal concept underlying trespass—was such an injury protected against by the rule of law invoked by the plaintiff? The majority held that the plaintiff's interest fell within the protection of this rule. Blackstone, J., held that another rule—that upon which the action on the case is based—was the appropriate rule. Causal

[39] 8 East, 1 (K. B. 1806).
[40] 9 H. L. Cas. 577 (1861).
[41] But see Davies v. Solomon, L. R. 7 Q. B. 112 (1871).
[42] Scott v. Shepherd, 2 Wm. Blackstone, 892 (C. P. 1773).

relation so frequently asserted to have been an issue in this case was not an issue; it obtained under either theory.[43]

In *Hollenbeck v. Johnson*,[44] the defendant's cow had in some way escaped from the owner's enclosure without his fault and strayed into the plaintiff's barn and crushed in the floor which covered a cistern located beneath the floor. Without any fault of his own, the plaintiff fell into this hole and sustained the injuries for which he sought recovery. The court held the damages to the plaintiff too "remote" and not "proximately" connected with the trespass of the defendant's cow—a strange conception of causal relation. The plaintiff relied on the rule of law which protects a property owner from injury to his property by trespass of a domestic animal having no known harmful propensities. He invoked the correct rule for his property damage and the court so held, but it could not be made the basis of recovery for his bodily injuries. Damages to this interest were remote only in the sense that the rule of law invoked did not protect it against such a hazard. The interest a person has in his bodily security is not fully protected. Conversely, a person is not absolutely responsible to others for all injuries caused by the activities either of himself or of his animals.

In the following cases, while negligence in some of them lay at the foundation of the action, still it was removed as an issue either because a violation of a statute was involved or else because negligence was admitted. It will be observed that where negligence is not an issue there is not any great difficulty with the problem. On the other hand, wherever negligence is an issue and must be determined there is likely to be confusion.

In *Gardner v. Cumberland Tel. Co.*,[45] the defendant negligently delivered a telegram to the plaintiff advising him that his brother was dead. His brother was not dead, and the telegram was to another person of the same name. The plaintiff sought to recover on the ground of negligence for the mental anguish caused him. Recovery was denied on the ground that the plaintiff was not a party to the contract. The rationale of the decision is that such an interest is not fully protected; the risk here involved is not one within the rule invoked. Here the problem stood out boldly but the court apparently did not see it. It is similar to those cases in which a statute has been violated and the question is whether the statute covers the hazard encountered.[46]

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[43] Guille v. Swan, 19 Johns. 381 (N. Y. Sup. Ct. 1822) is the same type of case.

[44] 79 Hun, 499 (N. Y. App. Div. 4th Dept. 1894).

[45] 207 Ky. 249, 268 S. W. 1108 (1925).

[46] See (1926) 4 TEX. L. REV. 270; Dickson v. Reuter's Tel. Co., 3 C. P. D. 1 (1877).

In *Hines v. Morrow*,[47] the plaintiff predicated negligence upon the failure of the defendant to keep a crossing in proper repair. The duty was statutory and owed to the plaintiff as a traveller on the public highway. The plaintiff, who had a wooden leg, was assisting the driver of a truck in pulling an automobile out of a mud hole in the highway at a point where it crossed the right-of-way. He knelt down to tie one end of the rope to the axle of the truck while the owner was tying it to the bogged car. When the plaintiff arose he gave the truck driver the signal to go ahead and started to step from between the two cars. He stepped into an unobservable hole with his wooden leg and, being unable to extricate himself by his own strength and realizing his peril, he caught the back end of the truck, expecting to be pulled out by holding on to the truck. As he did this the slack in the rope became entwined around his sound leg and broke it at the ankle so as to require amputation. The defense was that the consequence could not be foreseen and was therefore not proximate. This was not the issue. The only problem was whether this risk fell within the radius of the rule which the plaintiff relied upon, *i.e.*, the defendant's duty to keep the crossing in proper repair, and which admittedly had been violated by the defendant. A recovery was allowed, but had the issue of negligence itself been a contestable one, the result would probably have been different.

In *Krach v. Heilman*,[48] the plaintiff sought to recover for the death of her husband to whom the defendant had furnished intoxicating liquor contrary to a statute. It appeared that the plaintiff's husband became drunk and unable to take care of himself and that in going home, while lying down in his wagon, a barrel of salt fell on him causing such injuries as proved fatal to him. The court denied recovery because the intoxication of the deceased was a "remote" cause. The problem here involved was not one of causation, but a proper definition of the scope of the rule relied on by the plaintiff for protection. Was the statute intended to protect her interest against such a risk as this? The court's holding necessarily denied such protection. But other courts have held risks as "remote" as this one to fall within the protection of the statute.[49] The only problem of any difficulty involved in this whole line of cases is that of defining the scope of the protection afforded by the statute. The question of causal connection is an incidental one and wherever made decisive constitutes a false issue.[50]

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[47] 236 S W. 183 (Tex. Civ. App. 1921).

[48] 53 Ind. 517 (1876).

[49] Mead v. Stratton, 87 N. Y. 493 (1882); Currier v. McKee, 99 Me. 364, 59 Atl. 442 (1904).

[50] See Roach v. Kelly, 194 Pa. 24, 44 Atl. 1090 (1899); Gage v. Harvey, 66 Ark. 68, 48 S. W. 898 (1898); Neu v. McKechnie, 95 N. Y. 632 (1884);

A truck driver, about his master's business, was caught out in a severe storm and, on acount of his exposure, pneumonia developed. He sought recovery under the Workmen's Compensation Act. There could be no doubt about the damage and the cause, but recovery was denied. The interest of the plaintiff was not given full protection; the risk is not within the purview of the statute.[51] In *Panama Railroad v. Rock*,[52] recovery for injuries resulting in death was denied under the Panama Code, although the language was broad enough to allow recovery.[53]

A railroad company failed to equip a car with automatic couplers as required by the safety appliance act. A brakeman, whose duty it was to stop a string of switched cars, failed to stop them in time to prevent a collision with a crippled car. His leg was crushed, while if the crippled car had been equipped with a coupler as required by law, his leg would not have been caught between the cars. The majority said that "the collision was not the proximate result of the defect . . . the collision . . . cannot be attributed to a violation of the provisions of the law." [54] This was a wholly false issue. What the court should have held (and in fact did hold) was that the statute was not designed to protect against such a risk, *i.e.*, a risk of personal injury on account of collision. The point is made clear by considering the cases relied on in the dissenting opinion. These were cases involving injuries which were clearly within the protection of the statute.[55] The issue of causation had no place in the discussion of this case if the court's interpretation of the statute was correct.[56]

An act requiring vessels carrying livestock to be fitted out with pens of small dimensions to prevent a spread of infectious disease was not complied with by the defendant and during the voyage the plaintiff's sheep were swept overboard by a rough sea. Had the vessel been provided with pens such loss would not have been sustained. The plaintiff relied for recovery on

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Dennison v. Van Wormer, 107 Mich. 461, 65 N. W. 274 (1895); Minot v. Doherty, 203 Mass. 37, 89 N. E. 188 (1909).

[51] Texas Employer's Ins. Ass'n v. Jackson, 265 S. W. 1027 (Tex. Comm. App. 1924); Landers v. City of Muskegon, 196 Mich. 750, 163 N. W. 43 (1917); Hagrove v. Arnold Const. Co., 229 Mich. 678, 202 N. W. 918 (1925).

[52] 266 U. S. 209, 45 Sup. Ct. 58 (1924).

[53] See (1924) 73 U. PA. L. REV. 215; (1925) 23 MICH. L. REV. 398; (1925) 38 HARV. L. REV. 499.

[54] Lang v. New York Central R. R., 255 U. S. 455, 461, 41 Sup. Ct. 381, 384 (1921).

[55] Louisville & N. R. R. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456 (1917); Minneapolis & St. L. R. R. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598 (1917).

[56] Glassey v. Worcester Ry., 185 Mass. 315, 70 N. E. 199 (1904) is soluble by a similar analysis; so is Smith v. Taylor-Button Co., 179 Wis. 232, 190 N. W. 999 (1923).

the terms of the act. Kelly, C. B., said: [57] "But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on the way to this country . . . the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable." Pigott, B.: [58] "Admit there has been a breach of duty; admit there has been a consequent injury; still the legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose."

A statute required railroad companies to construct culverts to care for the drainage of adjacent land. The plaintiff invoked this statute as a basis for liability for the drowning of his child in water accumulated on the right-of-way. The court denied recovery, saying: "The object of this statute was to prevent the railroad from unnecessarily interfering with the natural drainage of the land on either side of its right of way." [59] *San Antonio Railway v. Behne*,[60] should have been decided on the same ground instead of on the false issue of proximate cause.[61]

In *Franklin v. Houston Electric Co.*,[62] the plaintiff alleged that the defendant, upon proper signal, negligently failed to stop its street car, as required by ordinance, to take him aboard as a passenger, and that by reason of such car passing by, the driver of an automobile following the car was so blinded by the dust that he could not stop his automobile before striking the plaintiff. The court, in holding that a demurrer was properly sustained to the plaintiff's petition, said: [63] ". . . the automobile was an intervening cause between the alleged negligent act of the operative of the street car and the injury. The two acts had no causal connection. The most that can be said is, that the alleged negligent act of defendant's servant was a remote cause of the accident complained of, one which, by the weight of

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[57] Gorris v. Scott, L. R. 9 Exch. 125, 129, 130 (1874).

[58] At 130. *Acc;* Bischof v. Illinois Southern Ry., 232 Ill. 446, 83 N. E. 948 (1908); Frontier Steam Laundry v. Connolly, 72 Neb. 767, 101 N. W. 995 (1904); Hocking Valley Ry. v. Phillips, 81 Ohio St. 453, 91 N. E. 118 (1910).

[59] Dobbins v. Missouri, K. & T. Ry., 91 Tex. 60, 65, 41 S. W. 62, 64 (1897).

[60] 231 S. W. 354 (Tex. Comm. App. 1921).

[61] See Green, *Are Negligence and "Proximate" Cause Determinable by the Same Test* (1923) 1 TEX. L. REV. 423, at 432.

[62] 286 S. W. 578 (Tex. Civ. App. 1926).

[63] At 579.

authority, is held to be too remote to be classed as a proximate cause."

There was no issue of causal connection in this case. That there was a very close causal relation is too clear for doubt. Likewise it was clear that the defendant violated the rule invoked by the plaintiff, *i.e.*, the defendant was negligent. The problem was the same whether the plaintiff relied on the violation of a common law rule or the ordinance pleaded by him. It was whether the rule invoked by the plaintiff afforded protection against this sort of hazard. The court itself so recognized it in a later part of the opinion: [64] "Section 1287, requiring street cars to stop to take on and discharge passengers, was manifestly not intended to prevent injuries such as is complained of in the present case." This was the decisive point.[65] Its solution depended upon far more subtle factors than causal connection.

In *Maskaliunas v. Chicago & W. I. R. R.*,[66] the plaintiff, a young boy, sought to recover for injuries received while trying to board a moving train operated by the defendant in the city of Chicago. Negligence was predicated on the defendant's failure to have its right-of-way fenced as required by a city ordinance. The court having held that the ordinance was for the protection of infants against such hazards (their own irresponsible trespasses) and the jury having found causal connection between the failure to maintain a fence and plaintiff's injuries, judgment in the plaintiff's favor was affirmed. Again, the decisive question was the scope of protection afforded by the rule infracted by the defendant.

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

A plaintiff was hurt by reason of a defective wheel of an automobile in which he was riding. He purchased the car from a retail dealer, but he sued the manufacturer with whom he had no contract relation and alleged its negligence in failing to inspect the car properly. The question was whether the plaintiff's right to be free from bodily harm was within the protection of the rule of law here invoked, *i.e.*, the duty on the part of the manufacturer to inspect. It was decided in favor of the plaintiff.[67] The whole line of cases involving the liability of a manufacturer to third persons presents the same problem.[68]

A similar question arises in carrier cases in which, owing to the delay of the carrier, a shipment of goods is overtaken and

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[64] At 580.

[65] Stephens v. Oklahoma City Ry., 28 Okla. 340, 114 Pac. 611 (1911) is subject to a similar criticism.

[66] 318 Ill. 142, 149 N. E. 23 (1925).

[67] McPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

[68] See also Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922).

destroyed by unusual natural phenomena, such as a cyclone, earthquake, lightning or unprecedented flood—ordinarily denominated "acts of God." Here the defendant is a wrongdoer, damages have resulted, and the delay has at least contributed something to the damage. But is the risk of encountering such phenomena one within the scope of the rule of law which makes delay a wrong? Prompt shipment is required to protect against the risks incurred by not unusual weather conditions, deterioration, market fluctuations and the like, but not against all risks and especially those which in the affairs of men are so unusual that they are ordinarily not guarded against at all and which are not thought of as sufficiently serious to take into account. Hence, the carrier is not required to fashion his conduct as to these unusual risks. The law affords the shipper no protection against them. The rule invoked is not designed to protect against a Galveston storm,[69] while it might be held to afford protection against floods in the Mississippi Valley where even "unusual" floods are of more or less frequent occurrence. Different courts might well differ on the same facts. In fact, there is a tendency in some jurisdictions to extend protection against some of these risks,[70] while in other jurisdictions protection is denied.[71]

D shot P's dog.[72] The dog rushed into the house and upset P, causing her physical injuries. P sued D for injuries to her person. P relied upon the rule that D was an intentional wrongdoer, and was therefore responsible for all injuries resulting from his conduct. D was an intentional wrongdoer as to the property interest and was responsible for all damages that his conduct caused the dog. But could P rely upon such a rule to support recovery for the injuries done her person? The Vermont court erroneously so decided. The rule of law invoked that a person shall not commit a trespass upon the property of another is not designed to protect against personal injuries unless such trespass is reasonably to be considered a trespass to the plaintiff's person.[73] Hence, if P is to recover in the case supposed, she should invoke another rule, *viz.*, that a person shall act with reasonable care if under all the circumstances his conduct is reasonably

[69] International & G. N. Ry. v. Bergman, 64 S. W. 999 (Tex. Civ. App. 1901).

[70] Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry., 130 Iowa, 123, 106 N. W. 498 (1906); Fox v. Boston & M. Ry., 148 Mass. 220, 19 N. E. 222 (1889); Bibb Broom Corn Co. v. Atchison, T. & S. F. Ry., 94 Minn. 269, 102 N. W. 709 (1905).

[71] Rodgers v. Mo. Pac. Ry., 75 Kan. 222, 88 Pac. 885 (1907); Denny v. New York Cent. Ry., 13 Gray, 481 (1859).

[72] Isham v. Dow's Estate, 70 Vt. 588, 41 Atl. 585 (1898).

[73] Lambrecht v. Schreyer, 129 Minn. 271, 152 N. W. 645 (1915); Clark v. Downing, 55 Vt. 259 (1882).

calculated to cause injury to another.[74] Should D have reasonably foreseen as not unlikely that by shooting P's dog he would cause P physical injury? If so, then since such injury has actually been occasioned by his conduct, D must be held accountable. P really has two causes of action against D. They are based upon different interests, and a different rule of law must be relied upon for recovery in each case. This being recognized, nothing remains to make them more difficult than any other ordinary tort case.

A similar case is presented in *Bigham v. T. & P. Railway.*[75] There the defendant failed to place a proper latch on its pen for loading cattle. A passing train caused the cattle to stampede. They rushed through the gate and over P who was attempting to fasten it. He suffered both a property loss and injuries to his person. He sought recovery for both. Clearly the duty to provide the gate with a latch was for the protection of P's property interest. The court had no difficulty with that phase of the case. But the court had great difficulty with the suit for personal injuries. It ought to have been readily seen that the rule of law invoked by P to vindicate his property interest was not designed to protect P's person. Had the court recognized this preliminary problem, it would have never reached the issue of causation. As a matter of fact, the issue of causation was as clear in this branch of the case as in the other branch. But the plaintiff was properly denied recovery for his personal injuries because his bodily security was not an interest which the rule of law invoked was designed to protect.

In *Bosch v. Burlington & Missouri R. Railway,*[76] the plaintiff sought to recover against the defendant for entering upon and occupying with buildings, tracks and cars certain streets between the plaintiff's property and the river, on account of which obstructions, the fire department was unable to reach the water in the river so as to prevent destruction of the plaintiff's buildings by a fire which had originated in an adjoining block. The court held that the defendant's wrongful acts were "too remote to be made the basis of recovery." The plaintiff's interest or right in the street was admittedly prejudiced by the defendant and the plaintiff could have recovered for this wrong. But the protection afforded the plaintiff to this right was not designed to give him the further protection against the hazard of fire. Expressed differently, taking possession of and obstructing the streets, while a wrong toward the plaintiff, did not subject the

[74] Heaven v. Pender, L. R. 11 Q. B. D. 503 (1883); McPherson v. Buick Motor Co., *supra* note 67.

[75] 90 Tex. 223, 38 S. W. 162 (1896). *Cf.* Eckert v. Long Island Railway, 43 N. Y. 502 (1870).

[76] 44 Iowa, 402 (1876).

defendant to the risk of becoming liable for a fire hazard, at least for such originating on other premises. The issue was not one of causation but whether the rule of law invoked by the plaintiff was designed to protect against the hazard in question. Under some conditions, it might well be held that such a risk is within the range of the rule protecting a person's right in an unobstructed street adjacent to his premises. But such a question is one of policy to be determined upon the consideration of many factors. Clearly it is not one of causation.

In *Central of Georgia Railway v. Price*,[77] the plaintiff was carried beyond her destination due to the negligence of the defendant's conductor. The latter made provision for her to spend the night at a hotel and to return on the morning train at the expense of the defendant. During the night a lamp which the plaintiff left burning in her room exploded and caused her physical injuries for which she sought to recover. The court denied recovery on the ground that the wrong of the defendant was not the proximate cause of her injury but the injury was caused by an intervening negligent hotel keeper. The decisive question was not one of causation, for having to remain in the hotel as a result of the defendant's negligence *was* a factor producing her injury. The plaintiff's right or interest was to be carried to the point of her destination without hurt by the defendant. But this interest is not given absolute protection. Neither the scope of protection given the plaintiff nor the extent of the defendant's liability covered everything which could conceivably cause the plaintiff harm. The court's duty in this case was to define the scope of the protection given to the plaintiff, the extent of the risk on the defendant under its undertaking. The only manner in which a cause issue could have become pertinent was by considering whether the defendant's negligence, as a factor in comparison with the other operative factors, really contributed appreciably to the injury. While this might have become an issue, still so long as the more important problem of determining the scope of the protection to which the plaintiff was entitled was unsolved, the cause element was immaterial.

In *Clark v. Gay*,[78] the defendant pursued a servant of the plaintiff into his house and killed the servant in the presence of the plaintiff's family. The family refused to occupy the house further. The plaintiff sought to recover from the defendant the value of his house. There is no question of cause here. Whether rational or not, the result was that for household purposes the house was no longer of value to the plaintiff. The question was whether this interest of the plaintiff in his property was protected by the rule invoked. Was this a risk incurred by the de-

[77] 106 Ga. 176, 32 S. E. 77 (1898).
[78] 112 Ga. 777, 38 S. E. 81 (1901).

fendant's commission of the murder? The court, in denying recovery, held not. The rule invoked by the plaintiff was lacking in reach.

In *Elliott v. Allegheny County Light Co.*,[79] a ladder on which the plaintiff was standing while painting slipped and caused him to fall. He clutched an electric light wire attached to the side of the building and, due to lack of proper insulation of the wire, was shocked and burned. He was denied recovery on the ground that the proximate cause of his injuries was his fall and not the uninsulated wire. This conclusion blinks the facts. The wire was clearly a substantial cause factor. The only question was whether the plaintiff's interest in his bodily security was protected by the rule which required the defendant to use care in maintaining its wire in good condition. Should the defendant in maintaining its wire be put under the risk of liability to one in the plaintiff's position? The conclusion of the court is questionable. If the real issue had been considered, the result might well have been different.

In *Ryan v. New York Central Railway*,[80] a railroad by its negligence set fire to its own property. From this the fire ignited and destroyed Ryan's house situated on an adjacent lot. The court thought that the damage was remote, *i. e.*, the causation was too dim. The rule is admittedly arbitrary,[81] and to make such a problem one of causation is to cast aside common intelligence. The only meaning of the decision is that adjacent property interests are not fully protected by the rule of law requiring reasonable care in handling fire. Protection is afforded only to the owner whose property is fired first hand by the defendant's wrongful conduct. The court said as much in substance, but its opinion is subject to several interpretations. The rule is not followed generally.[82]

In *Connecticut Mutual Life Insurance Co. v. New York, N. H. & H. Railway*,[83] the plaintiff sought to recover from the defendant the amount of a policy which the plaintiff had paid to the beneficiary on account of the negligent killing of the insured. The court refused to give protection to the insurance company's interest in the life of its policy holder and denied a recovery. The court indicated that the loss was a "remote and indirect" consequence of the misconduct of the defendant and the case has been considered as an instance of remote causation. This was er-

[79] 204 Pa. 568, 54 Atl. 278 (1903); see Hope v. Edison Light Co., 284 Pa. 112, 130 Atl. 309 (1925) for a similar case.

[80] 35 N. Y. 209 (1866). Also see Moore v. Van Buren and N. Y. Bill Posting Co., 240 N. Y. 673, 148 N. E. 753 (1925).

[81] Bird v. St. Paul Fire & Marine Ins. Co., 224 N. Y. 47, 120 N. E. 86 (1918).

[82] Milwaukee & St. Paul Ry. v. Kellogg, 94 U. S. 469 (1876).

[83] 25 Conn. 265 (1856).

roneous. The element of causation was present, but the common law, as in many cases, does not recognize such an interest as deserving of protection against this sort of hazard, nor does the statute permitting a recovery for death by wrongful act extend protection to it.[84]

In suits for injuries resulting from fright or nervous shock in the absence of physical impact, some courts refuse recovery altogether, while if there is the slightest physical impact recovery will be allowed.[85] So long as this is done on the basis that the interest or right of a person to be free from bodily harm caused by the failure to use care on the part of a defendant is not given full protection, but protection is only accorded in certain cases, *i. e.*, when the interest is injured in a certain manner, the decisions are intelligible. But when recovery is denied in such cases on the ground that the element of causation is lacking or is remote, such decisions can only be attributed to a failure to understand the true character of the cause problem.[86] The doctrine denying recovery in such cases is really based on a so-called public policy, a balancing of interests, with the conclusion that it is better to deny protection to the interest involved under such circumstances than it is to undertake to give compensation under all the difficulties of the case.[87]

In *Wineberg v. Dubois Borough*,[88] the plaintiff's knee was injured by reason of her falling from a board walk negligently maintained along a public street. Before she fully recovered she suffered further injuries by reason of a second fall which she was unable to prevent on account of her leg being stiff. The trial court's charge permitted her to recover for the second injuries if the jury found they were proximately caused by the negligence of the defendant in causing the first fall. The appellate court held there was no relation of cause and effect between the two falls and denied recovery for the second injuries. Whatever may be the decisive issue here as the case is presented, it is not a lack of causal connection. It would seem that the only problem is whether the protection afforded by law to the plaintiff against the negligence of the town in maintaining its sidewalk extends to subsequent injuries even though they be a result of the injuries first received. The scope of the protection given by any rule must have a boundary; the risk under which a defendant is placed must have a limit. This problem, however phrased, is one of balancing of interests. Should not the court have faced it

[84] Mobile Life Ins. Co. v. Brame, 95 U. S. 754 (1877).

[85] Spade v. Lynn & Boston Ry., 168 Mass. 285, 47 N. E. 88 (1897).

[86] Bucknam v. Great Northern Ry., 76 Minn. 373, 79 N. W. 98 (1899).

[87] See, generally, Throckmorton, *Damages for Fright* (1921) 34 HARV. L. REV. 260; Wilson, *The New York Rule as to Nervous Shock* (1926) 11 CORN. L. Q. 512.

[88] 209 Pa. 430, 58 Atl. 807 (1904).

squarely and declared as a practical matter that in such a case as this the limit of responsibility, irrespective of cause, is the damage done in the primary instance? [89]

In *Scheffer v. Railway*,[90] the plaintiff alleged that as a result of a wreck caused by the negligent collision of the defendant's trains, Scheffer, deceased, was so injured in body and mind that he took his own life. The court sustained a demurrer to the declaration, holding the defendant's negligence too remote. Surely causal connection was not wanting in the allegations. Had imbecility or tuberculosis resulted from the injuries received, the court would not have reached such a conclusion. If the deceased, while in a delirium as a result of his injuries, had torn off his bandages and infected his wounds so that blood poisoning had set in, no such conclusion would have been reached.[91] The meaning of the decision is merely that this character of result is not within the protection of the rule of law relied on by the plaintiff. Suicide as a result of a deranged mental condition is not a risk which a defendant incurs by negligently hurting another. The question is not one of causal connection, but one of fixing the boundaries of a legal rule, and it is doubtful that such are correctly marked out in this instance.[92] There is no such holding under the Workmen's Compensation Act.[93]

In *Clark v. Wallace*,[94] the plaintiff's employee in charge of certain sheep and unharvested feed was called away to assist a neighbor—the defendant. While away, fire started by the employee's wife got beyond control and consumed the feed in the field. The plaintiff sought to recover damages on account of its loss. Recovery was denied on the ground that the absence of the employee was not a proximate cause of the loss. This was at least a doubtful issue. The controlling issue, however, was whether the invasion of the plaintiff's interest by calling away his employee devolved such a risk upon the defendant. Did such hazard fall within the scope of the rule which prohibited the defendant from interfering with the duties of plaintiff's workman? A consideration of this issue would no doubt have made it more difficult to decide that the defendant was under no duty. And, having decided it affirmatively, the issue of causation would have probably been decided differently.

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[89] See Hoseth v. Preston Mill Co., 49 Wash. 682, 96 Pac. 423 (1908); Wagner v. Mittendorf, 232 N. Y. 481, 134 N. E. 539 (1922).

[90] 105 U. S. 249 (1881).

[91] Daniels v. New York, N. H. & H. Ry., 183 Mass. 393, 67 N. E. 424 (1903).

[92] See Salsedo v. Palmer, 278 Fed. 92 (C. C. A. 2d, 1921); (1922) 1 TEX. L. REV. 114.

[93] Malone v. Cayzer, Irvine & Co., 45 Scot. L. R. 351 (1908).

[94] 51 Colo. 437, 118 Pac. 973 (1911).

SUMMARY

So far the attempt has been merely to clear the way for a serious attack upon the principal redoubts of "proximate" cause which are to be found in negligence cases. But even at this stage it should be clear that it is in connection with the problem of defining the scope of protection given to any interest that the courts are prone to seek relief in that vague conception of "legal cause" or "proximate cause" as opposed to causal connection as we speak of it generally. Moreover, if there is any warrant for this elusive phrase it is in this connection. It must be clear, also, that for the purposes required, such conception is entirely too restrictive unless given a weighted meaning incomparably broader and deeper than the words themselves ordinarily signify. But if given such weighted meaning, it then is something entirely different from *cause* in the sense of "cause and effect" which is also an element of legal liability. Either we must recognize at least two kinds of "cause" meaning entirely different things, as has already been developed by the courts, or else we must find some way in which to relieve the term of this weighted meaning. It is thought that the analysis here suggested does this and thereby makes clear the problems which are involved so that they can be dealt with rationally. Such an analysis does not solve the problem. It does have the advantage, however, of indicating what the problem is, drawing attention to the factors involved, leaving to the judge at least the opportunity to appreciate the high function his judicial power must perform.

In extreme cases the process is readily observable. When a statute is invoked, for example, the court must first inquire whether the statute covers this kind of case. Was the statute designed to give protection against this sort of hazard? The court will ordinarily consider innumerable factors in reaching a conclusion on this kind of problem, but if it decides the statute does not cover the case, the litigation is ended. While if the decision is otherwise on this point, then the court faces the further problems of determining whether the defendant violated the statute, and what items of loss the plaintiff was caused by such infraction.

Likewise, when the court is faced with a case based on a common law rule it is believed the same process is involved. Is there any reason for thinking that it is not? The difficulties may be very much greater, however. Assuming that the court in such a case accurately perceives the interest which has been injured, and the hazard which has befallen such interest has been ascertained, it is still very probable that, except in the clearest cases, the rule relied on will not stand out with such bold-

ness and uncertainty as a statutory rule. But this difficulty does not do away with the necessity either for invoking a proper rule in vindication of the injury incurred or for determining the range of such rule. This is as important in the administration of justice as that the interest itself be a protected one. It is no more possible to vindicate an injury to an interest caused by deceit by invoking a rule prohibiting battery than it is to vindicate the public's interest against murder by relying on a breach of contract. The court, therefore, cannot escape the necessity of outlining or defining in every case the rule relied on so that it may appear clearly enough for the court both to determine its appropriateness and to measure its bounds. Otherwise, its judgment as to whether the particular hazard falls within the reach of the rule will have the same haziness as the conception of the rule itself. All of these are steps necessary to be taken preliminarily to the court's decision as to whether the rule covers such a case. Only after it has so answered does it become necessary to go further and determine whether the defendant violated such a rule, and if so, what the items of loss are which the violation caused the plaintiff to suffer.

No doubt the most difficult step in the process preliminary to making a decision on a problem of this nature is the definite articulation of the rule relied on in a particular case.[95] In most instances, perhaps, this is done without consciously taking the step, for most cases are of a normal or standardized type, requiring no conscious consideration. But in the unusual or off-type case the problem cannot be so handled. There, no tracks have been made for the judge to follow, and the precision with which he deals with the problem is decisive. If he fails to recognize it, ignores it, blurs it, or shifts it under any guise to the jury, we may expect irrational results. Ordinarily the problem is dealt with so as to reach satisfactory results except in negligence cases. There, due to the many complexities which arise from other problems, as later to be developed, little understanding of the vital part which should be played by this factor in the determination of legal liability has been indicated in the opinions of the courts.

[95] Professor Bingham makes a very similar approach to the problem by requiring the court to define the scope of the duty of a defendant. He suggests that duties are always concrete while a rule or principle of law is an abstraction, a generalization drawn from a number of decided cases and that it can never be defined except in terms of concrete duty. The difference is not thought to be a material one. It is the old problem of which was first, the hen or the egg. We constantly employ both terms and for a particular case it is perhaps no more difficult to define the rule than to define the duty. The process is the same. In one, it is to determine whether the hazard created by defendant's conduct falls within the scope or range of the rule invoked; in the other, to determine whether the conduct of defendant falls within the scope of his legal duty which is claimed to have been violated. Much if not all that is contended for by Professor Bingham, save the terminology, gives support to our suggestion. See his very incisive and rational discussion in 9 COL. L. REV. 16–23.