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PROXIMATE CAUSE IN MINNESOTA*

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PROXIMATE cause cases fall into two major categories; they entail either a dispute over what happened, or a dispute over the legal consequences that attach to events.[1] This distinction is crucial for advocates. The first kind of dispute calls for preparation and presentation of proof. The relevant law is, largely, the law of procedure—the qualification of experts, the acceptability of circumstantial evidence, the allocation of burdens of proof, and so on. The second kind of dispute is not settled by proof; it entails the application of the law to the facts of a case. It calls for the preparation and presentation of skilled arguments to judge or jury—arguments on the meaning and scope of substantive law as found in precedents, opinions, texts, jury charges, and so on. This paper will deal with each of these kinds of problems and the relations between the two. Primarily my interest is in examining recent Minnesota decisions for the purpose of considering the functions of the advocates and how they best can deal with causation issues.

*In an exceptionally able article, The Minnesota Law of Proximate Cause, 21 Minn. L. Rev. 19 (1936) Dean William L. Prosser has discussed this same subject and made a far more extensive collection of the Minnesota cases than has been made here. See also Rules Governing Proximate Cause in Minnesota, 16 Minn. L. Rev. 829 (1932). I have tried to add all of the more important cases decided in the last 13 years. I find myself largely in accord with Prosser's views, but this article has been written from a different viewpoint which calls for a different organization of materials and different emphases.

Proximate cause has been the subject of more legal writing than any other topic in the law of torts. Prosser collects many of the important authorities in footnote 9, page 20 of his article. To my mind the greatest contemporary teacher of proximate cause is Professor Leon Green, whose book, A Rationale of Proximate Cause, is well known. I have learned much from him and from Egerton which may be hidden by our differences in vocabulary.

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1. Of course, both kinds of disputes may and sometimes do occur in a single case.

I. Cause in Fact—Proof Problems

Counsel who has recognized a cause-in-fact problem usually tries to get a preliminary understanding of the connection (or lack of it) between the defendant's conduct and the plaintiff's damages without too much bother about proof. Only after he begins to understand the facts does he plan his court-room strategy. The reader of reported cases can seldom retrace the process and discover why one program of proof, rather than some other, was adopted. A check list of methods of establishing cause in fact, and a discussion of some of their practical implications may be useful to novices and refresh the memories of the more experienced.

A. *Eye-witnesses*

The testimony of eye-witnesses may foreclose any dispute on causation. If witnesses saw a motorist run over a pedestrian who was then carted off to the hospital with a broken leg, defense counsel is likely to concede the causal relation between the accident and the injury. But when no one observes impact a dispute on causal connection may occur.

In *Smock v. Mankato Elks Club*[2] the plaintiff proved that she went to the defendant's New Year's Eve party; much combustible material gathered on the floor during the evening; few ash-trays were provided for many smokers; and her dress caught on fire. But she adduced no proof that the fire started in the rubbish. The Supreme Court held that the proof did not support the plaintiff's $150 verdict. Had she proved a fire in the rubbish which spread to her dress the court might have let the verdict stand. If such were the facts, eye-witnesses who could have testified to them would have been most useful.

Defense counsel can also make telling use of eye-witnesses. In *Peterson v. Fulton*[3] the plaintiff was injured in an automobile collision, and sued the drivers of three cars. The plaintiff was a passenger in car #1, which was being followed by car #2. Both drivers, in turn, failed to obey a stop sign. Car #3 was traveling on the through street; collided with car #1, caromed off of it; and then collided with car #2. By direct and cross-examination of eye-witnesses, counsel for the driver of car #2 was able to establish that all of plaintiff's injuries were incurred in the first collision. The Supreme Court ruled that the evidence did not support a verdict against his client.

2. 203 Minn. 265, 280 N. W. 851 (1938).
3. 192 Minn. 360, 256 N. W. 901 (1934).

B. *Expert Testimony*

Sometimes the need for expert testimony is patent, and the likelihood that opposing experts will disagree is obvious. *Harris v. Wood*[4] is a good example. The plaintiff's decedent died in the defendant's dental chair during the administration of gas. The crux of the case was the cause of death. Plaintiff's medical experts testified that death resulted from asphyxia; the defendant's medical experts maintained that death resulted from a heart attack that had no medical relation to the anaesthesia. Each counsel's chance of success depended on persuading the jury that his experts were the more credible. The Supreme Court held that the evidence was sufficient to support a verdict for the plaintiff; it would probably have affirmed had the jury accepted the defense-experts' version.

In *Christensen v. Northern States Power Co.*[5] a plaintiff did not supply needed expert testimony, and the Supreme Court held that he had not adduced sufficient proof. The plaintiff's lake, well-stocked in the autumn, had no fish in it the following spring. The defendant's 66,000 volt power line was supported by a tower rising out of the lake bed. In mid-winter ice pressure tipped the tower and the current was grounded for four seconds. The plaintiff claimed that his fish were electrocuted; but he introduced no expert proof to substantiate this claim. That high voltage electricity destroys life is common knowledge; but it is not commonly known—if it is in fact true at all—that electricity grounded in the center of a large lake charges the waters of the entire lake.

Sometimes scientific problems take unexpected turns; and aspects that seem important to counsel detract attention from other crucial issues. In the recent interesting case of *De Vere v. Parten*[6] the plaintiff suffered transverse myelitis which she claimed was caused by breathing fumes in the defendant's manufacturing plant, where she worked. Soon after the defendant had started using a process volatilizing carbon tetrachloride the plaintiff sickened and later became paralyzed from the waist down.

No doubt counsel for both sides supposed that this case was one like the dentist case discussed above—that the crucial question was: did paralysis result from carbon tetrachloride poisoning? The plaintiff's lawyer was specially concerned, since in all previous medical history no case of transverse myelitis had been ascribed to carbon tetrachloride poisoning. As in the dentist case, the experts

4. 214 Minn. 492, 8 N. W. 2d 818 (1943).
5. 222 Minn. 474, 25 N. W. 2d 659 (1946). *Cf.* Homer v. Micholson, 198 Minn. 55, 268 N. W. 852 (1936).
6. 222 Minn. 211, 23 N. W. 2d 584 (1946).

disagreed; three testified for the plaintiff that carbon tetrachloride poisoning caused her paralysis; and the defendant countered with contradictory testimony.

But a less spectacular issue was also crucial. Did the plaintiff contract carbon tetrachloride poisoning? On cross-examination the plaintiff's witnesses testified that carbon tetrachloride fumes are poisonous only when they exceed 100 parts to a million parts of air. The defendant had used no more than three gallons of carbon tetrachloride a week which would produce no more than two parts to a million of air. The report of the case indicates no direct disproof of the inference that the plaintiff was not subjected to a poisonous concentration. The Supreme Court affirmed the trial court's refusal of a new trial after verdict for the defendant, and stated that the verdict was the only possible one under the circumstances.

The plaintiff's council no doubt foresaw that he needed proof of poisoning. His experts testified that the plaintiff showed distinctive symptoms of carbon tetrachloride poisoning. Three other persons who worked in the same room also showed the symptoms.

The court's statement—that verdict for the defendant was the only proper jury finding—implies that the proof of symptoms was not sufficient evidence, under the circumstances, to justify a finding that the plaintiff had been poisoned. But proof of the symptoms at least develops an unexplained inconsistency. Either proof of lethal concentration was in error, or the symptoms were unreliable, or special conditions resulted in uneven concentration, or some other scientific explanation accounts for this inconsistency. Of course, the plaintiff has the burden of proof on causation, and in the absence of explanation of this inconsistency the court's holding was not improper. The lesson of the *De Vere* case is that scientific demonstration may be far from simple. On complicated technical issues the focus of interest can shift from one aspect to another. Success depends on thorough understanding of much more than law. Counsel must educate himself in the relevant sciences and develop relatively complete opportunity of pre-trial investigation.

C. *Circumstantial Evidence*

Nearly all proof presupposes that the fact-triers will draw some inferences. Normally the process goes on without special note. But in some cause cases the circumstantial nature of proof comes spectacularly to the fore.

In *Paine v. Gamble Stores*[7] the plaintiff proved that her decedent

7. 202 Minn. 462, 279 N. W. 257 (1938). See also Silver v. Harbison, 178 Minn. 271, 226 N. W. 932 (1929).

left home one afternoon and was found dead the following morning at the bottom of the stair-well that afforded entrance to the defendant's basement. The stair-well abutted on a public alley. It was originally guarded by a two-pipe railing; but the top rail protecting the deep end had been missing for some time. Plaintiff's counsel was faced with the problem of proving that: (1) decedent's entry was over the improperly guarded end, and not over the properly guarded side or through the gate at the head of the stairs; and that (2) the decedent was not pushed, but fell into the well. (The plaintiff did not have the burden of proving decedent free from contributory negligence; he was presumed to have used due care.)

The proof that tended to show that entry was over the end was: the position and condition of the body when found was consistent with a fall over the end; prongs of the deceased's ring setting were scratched and a fresh scratch on the end-wall could have been made by them; undisturbed dust and rubbish on the steps was inconsistent with a fall down them. The proof that tended to show that the decedent was not pushed into the well was: the body showed no marks of violence other than the broken neck which obviously resulted from the fall; no signs of a struggle near the stair-well could be found. This evidence was held sufficient to support a verdict for the plaintiff.

The preparation of such a case is virtually detective work. Fortunately for the plaintiff the body was found by the police who made a thorough investigation before the site was disturbed and who were available as witnesses.

Sometimes circumstantial evidence is substituted for more costly expert testimony. In *Ellis v. Lindmark*[8] the plaintiff ordered cod-liver oil from a drug store. Negligence of the druggist and his wholesaler resulted in delivery of linseed oil, which the plaintiff used in poultry mash. The plaintiff's thousand-chicken flock did not prosper as it had in prior years. Over the defendant's objection, the plaintiff was allowed to prove that other chicken raisers had similar experiences. The Supreme Court held this evidence competent. The court did not discuss the sufficiency of this relatively weak proof that the unusual diet caused the deterioration of the flock. The defendants, who had to answer to many poultry raisers on similar claims, were unlikely to have overlooked the causation issue. The defendant's failure to offer expert proof implies that they had investigated and found the facts against them—they

8. 177 Minn. 390, 225 N. W. 395 (1929).

were unlikely to have rested their case if they had favorable scientific evidence without offering it. Though the plaintiff had the burden of proof, consideration of these practicalities probably explains why no attack was made on his relatively weak case on causation. The burden of proof is a practical and not merely a logical facet of the administration of justice.

At long range the kibitzer is lead to wonder why the plaintiff's lawyer risked the sufficiency of this evidence. The significance of the holding, for this discussion, however, is that this kind of evidence can be used to establish cause. It may be persuasive and useful when expert testimony is unavailable or too costly. Of course it is subject to rebuttal. The defendant's expert testimony may discredit it entirely. And defense counsel might be able to return it in kind. If some flock had flourished on the substitute, the inference of causal connection between the linseed oil diet and flock infirmity would be impaired.

II. Distinguishing between Proximate and Remote Causes

In the cases discussed both litigants and courts assumed that the crucial causation problem was an issue of non-legal fact. These cases were discussed—and decided—without any special definition of cause. When the cause issue is one of fact almost any legal definition of cause is fool-proof. "Natural and probable consequence," "substantial factor," "material element," "direct cause," "uninterrupted chain of events," "absence of superceding causes" are all unlikely to mislead counsel, judge, or jury. Errors on the trial of such an issue are almost sure to be improper rulings on the admissibility or weight of evidence, rather than errors of statement and application of the substantive law of proximate cause.

But in other cases, even after unequivocal proof of exactly what happened, a problem still remains—is the defendant to blame *for* the plaintiff's injury? Even though a defendant's wrong is a cause-in-fact of harm, he is liable only if his wrong is a "proximate," rather than a "remote" cause. How is this discrimination made?

Most of the cases in which the need for distinguishing between proximate and remote causes occurs, fall into one of the two following classes:

(1) Cases in which, even though the plaintiff's injury is in fact an aftermath or consequence of the defendant's wrong,[9] nevertheless, the connection between the wrong and the injury is fortuitous.

9. Which is somewhat different from being an "effect" or "result" (in the scientific sense of these words) of the defendant's wrong.

The outcome of the defendant's misconduct has tended to be peculiar or unique.

The common sense form of the question which these cases raise can be stated like this: Is the defendant to blame *for* such a consequence, or is the injury just an accidental upshot for which the defendant should not be held?

When injuries are routine this question does not occur. If a motorist negligently runs down a careful pedestrian and breaks his leg, which mends in the ordinary way, no one would question that the break, resultant routine medical and hospital expenses, pedestrian's loss of time at an ordinary occupation, and typical mental pain and suffering are all proximately caused by the negligence. In such a case the legal issue of proximate cause (as distinguished from problems of proof) is only a formal issue, and is decided in the plaintiff's favor without dispute.

(2) Cases in which the plaintiff's injury is the aftermath of both the defendant's wrongdoing and some other force—either the misconduct of a third person or a malevolent turn of nature. Some other antecedent competes with the defendant's wrong as the author of the plaintiff's harm. (Of course the defendant is not necessarily relieved from responsibility even though another antecedent is *a* proximate cause of the plaintiff's harm. There may be more than one proximate cause of an injury. The defendant's wrong may also be a proximate cause.[10])

The common sense form of the question which these cases raise can be stated like this: Is the defendant at least partially to blame *for* this injury, or is another antecedent to be adjudged solely responsible for it?

In these cases even though the defendant's wrong fortuitously sets the stage for some other antecedent (which would have been harmless had the defendant not misbehaved) yet the defendant's part in the misadventure may—or may not—pale into insignificance.

These two identifying classes of proximate cause cases are not mutally exclusive. Some cases fall in both classes. The classification is only a descriptive aid identifying remoteness problems, and is of no value in proceeding further to solutions. Since remoteness problems are problems of determining what legal consequences attach to certain kinds of facts, the lawyer naturally turns to rules of law for solutions.

10. Cooper v. Hoeglund, 221 Minn. 446, 22 N. W. 2d 450 (1946); Ellis v. Lindmark, 177 Minn. 390, 225 N. W. 395 (1929); Hall v. Minneapolis St R., 223 Minn. 243, 26 N. W. 2d 178 (1947).

A. *The Natural and Probable Consequence Rule—Foreseeability as a Test*

One of the most popular judicial formulations for dealing with proximate cause is: A defendant is liable only for the natural and probable consequences of his wrong. This rule had vogue in Minnesota in the 19th century, but was repudiated by Mr. Justice Mitchell in *Christianson v. Chicago, St. P. M. & O. R.*[11] in 1896. Nevertheless later discussion will show that experience with the rule is not without significance for present-day Minnesota advocates.

Wherever the rule has been used, it has been interpreted to mean that the defendant is liable only for foreseeable consequences —consequences which a reasonable man in the defendant's position could anticipate.

Mr. Justice Mitchell pointed out that foresight of harm bears on another issue—negligence. Only when a reasonable man in the defendant's position can appreciate risk may a defendant be held negligent.[12] But a defendant is not necessarily innocent of negligence when he cannot foresee *the details* of the harm he may do. Unreasonably high speed on highways causes various kinds of accidents and produces a great variety of damages. Without foreknowledge of the particular accidents that may happen and of the exact harms that may flow from them, the reasonable man recognizes the imprudence of excessively high speeds.

Once an accident has occurred it is always a specific accident that happened in a particular way and resulted in discrete harms. When, after the event, the question is asked, was the particular accident and resulting damage foreseeable, the cases fall into three classes:

(1) In some cases the accident and the resulting damages are so typical that judges and jurors cannot be convinced that they were unforeseeable. If the defendant argues that insignicant details could not be foreseen his position sounds silly and does not merit serious consideration.

(2) In some cases the freakishness of the facts refuses to be submerged, and any description that minimizes it is viewed as a suppression of important facts.

11. 67 Minn. 94, 69 N. W. 640 (1896). *But see* Guile v. Greenberg, 192 Minn. 548, 257 N. W. 649 (1934); Wedel v. Johnson, 196 Minn. 170, 264 N. W. 689 (1936). Prosser has collected some of the earlier opinions which treat the natural-and-probable-consequence rule with respect. 21 Minn. L. Rev. 19, 29, n. 54 (1936).

12. Foresight of harm is not the only requirement. One may reasonably take known, and even great, risks under some circumstances.

For example, in a recent Louisiana case[13] the defendant negligently left his truck on a highway at night without setting out lights or flares. A car crashed into the truck and caught fire. The plaintiff came to the rescue of the occupants—a man and wife. After he got them out of the car, he returned to get a floor mat to pillow the injured wife's head. He picked up a pistol which lay on the floor of the car and handed it to the husband. The husband was temporarily deranged and shot the plaintiff in the leg. Such a consequence of negligently leaving the truck in the highway is unforeseeable.

(3) Between these two types of cases is a third class in which the consequences are neither typical nor wildly freakish. In these cases the unusual details are arguably—but only arguably—significant. If they are held to be significant then the consequences are unforeseeable; but if they are held to be unimportant then the consequences are foreseeable.

For example, in a Texas case[14] the plaintiff was one of two men sent out on a service truck to tow a stalled car. The plaintiff made the tow rope fast, and attempted to step out from between the vehicles as the truck started. His artificial leg slipped into a mud hole which had resulted from the defendant-railroad's disregard of its statutory duty to maintain this portion of the highway. The plaintiff was unable to extricate his peg leg and was in danger of being run over by the car. He grabbed the tail gate of the truck to use its force to pull him loose. A loop in the tow rope lassoed his good leg, and it was broken.

As long as these details are considered significant facts of the case the accident is unforeseeable. No doubt some courts would stress them and reach that result. As a matter of fact the Texas courts have on occasion ruled that much less freakish accidents are unforeseeable.[15] But in the peg leg case the court quoted with approval the plaintiff's lawyer's "description" of the "facts" which was couched in these words: "The case stated in briefest form, is simply this: Appellee was on the highway, using it in a lawful manner, and slipped into this hole, created by appellant's negligence, and was injured in attempting to extricate himself. . . ." The court also adopted the plaintiff's answer to the defendant's attempt to stress details, as follows: "Appellant contends . . . it could not reasonably have foreseen that slipping into this hole would have

13. Lynch v. Fisher, 34 So. 2d 513 (La. App. 1948).
14. Hines v. Morrow, 236 S. W. 183 (Tex. Civ. App. 1922).
15. *E.g.*, Seale v. Gulf, C. & S. F. R., 65 Tex. 274 (1896).

caused the appellee to have become entangled in a rope, and the moving truck, with such dire results. The answer is plain: The exact consequences do not have to be foreseen. . . ."

In this third class of cases (which includes most, but not quite all, of the cases raising real problems of remoteness) the foreseeability "test" can be applied only after the significant facts have been described. If the description is detailed, the accident is called unforeseeable; if it is general the accident is called foreseeable. Since there is no authoritative guide to how the facts should be described the ostensible testing-power of the process is illusory.

This analysis has practical value for the Minnesota advocate on two scores: (1) We shall see later that even though the natural-and-probable-consequence rule has been repudiated, nevertheless the Supreme Court has announced that foresight is a criterion of proximity in some kinds of cases. (2) The problem of remoteness involves a judgment on whether the defendant is to blame *for* the plaintiff's injury; and those who judge—regardless of what formula they use—tend to view the freak injury as the workings of malevolent fate, rather than as responsibly caused by misconduct that happens to trigger-off events culminating in that injury. A plaintiff, therefore, is likely to dispose judges and jurors in his favor if he persuades them that unusual aspects of the case are insignificant details. On the other hand, a defendant may induce psychological support if he can convince them that the freakish facts are a prominent and significant part of the case. (Such advocacy is a fine art. Counsel who overdoes it, strengthens, rather than weakens, his opponent. If plaintiff's lawyer insists on a too-general discription he appears to be trying to suppress important facts; if defense counsel insists on a too-specific description, he patently tries to take advantage of mere technicality.)

B. *The Substantial Factor (or Material Element) Rule*

In 1920 the Supreme Court in *Anderson v. Minneapolis, St. P. & S. S. M. R.*[16] first used a criterion of remoteness like that formulated some years before by Professor Jeremiah Smith, an outstanding Harvard torts teacher.[17] Smith suggested this rule: Only when the defendant's wrong is a substantial factor in producing the plaintiff's injury is the wrong a proximate cause of the injury.

A "factor in producing" an injury is a cause of that injury. The

16. 146 Minn. 430, 179 N. W. 45 (1920). See, Restatement, Torts § 431; and Green, Rationale of Proximate Cause c. 5, pp. 136-141.

17. Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 223, 303 (1912).

relationship of cause to consequence is, *in fact,* an all-or-none relationship. That is, either an event is, *in fact* a cause of another event, or it is not. No event can be, *in fact,* an insubstantial cause of another event. The reference, then, of the word "substantial" is not factual. But a cause that is substantial-in-fact can be insubstantial in law—a factual antecedent is not necessarily legally proximate. So I conclude that the reference of the word is to legal substantiality. A statement of the rule making this analysis explicit is: A legally substantial cause is a proximate cause.

But since by definition only proximate causes are legally important (legally substantial), the "test" supplies only a new synonym for a troublesome legal concept. This synonym is put forward to solve difficulties not rooted in lack of words, but rooted in lack of understanding. And since the synonym is, itself, undefined it throws little new light on the nature of legal remoteness. When the question, "Is this defendant to blame *for* this injury?" is hard to answer, I get no more help from the substantial factor "test" than from the term "proximate cause" used raw. Nor is meaning added by appending "material element" (as was done in the *Anderson* case) to "substantial factor." The materiality of a causal relationship, once that relationship exists in fact, is likewise a legal matter. Legally-material-cause is only another undefined substitute for proximate cause.

Mr. Justice Loring voiced this impotency of the substantial factor as a criterion of proximity in *Walker v. Stecher.*[18] In that case, two successive collisions with the plaintiff's automobile resulted in injury. The defendant's car collided with the plaintiff's, and shortly thereafter a third car hit it. Most of plaintiff's injuries were incurred in the second collision. At the trial the jury charge included the substantial-factor-and-material-element test. In the Supreme Court the defendant unsuccessfully contended, in effect, that the driver of the third car was to blame *for* the injuries resulting from the second collision, and that the defendant was not.

Mr. Justice Loring concurred on the ground that the defendant had not objected to the tenor of the charge, but had objected only to any submission of the issue. He said that he thought it was time to recognize the inadequacy of the substantial-factor-and-material-element rule—that the rule supplied definitions that needed defining

18. 219 Minn. 152, 17 N. W. 2d 317 (1944). Prosser concludes, "The material element and substantial factor test is adequate as to the problem of causation in fact, but is of no real assistance in dealing with other problems." 21 Minn. L. Rev. 19, 67 (1936).

and in the absence of better instructions jurors might hold remote causes proximate. I take Loring's objection to mean that he feared jurors might think "substantial" to mean "substantial-in-fact," and since all causes are substantial in fact jurors might fail to consider the very problem submitted to them—whether a cause-in-fact is also a proximate cause.

At any rate, such a fear materialized in *Seward v. Minneapolis St. R.*[19] The plaintiff had parked his truck, which had a defective hand brake, on an uphill street. He went across the street to mail letters, then turned around and saw his driverless truck backing out into traffic. While trying to recapture his wayward vehicle, he was run over by the defendant's street car. The proof tended to show that the defendant's motorette saw the plaintiff's situation and thereafter failed to use reasonable care for his safety. On the issue of the proximity of the plaintiff's negligence to his injury, the trial judge charged in terms of material-element-and-substantial-factor. The jury returned a verdict for the defendant. The Supreme Court reversed on the ground (among others) that the jury needed more guidance on the nature of proximate cause than the instruction gave them—the very point that Loring had previously made.

C. *Superceding Intervening Efficient Causes—Unbroken Sequences*

The Supreme Court, in the *Seward* case, did not reject the substantial factor theory as wrong. The theory was held inadequate. For proper amplification the court borrowed from Mitchell's famous opinion in the *Christianson* case[20] in which (after rejecting the natural and probable consequence rule) he said that proximate consequences follow from the defendant's wrong in unbroken sequence and without intervening efficient causes. This approach sets the problem of distinguishing between intervening causes legally sufficient to supercede the defendant's misconduct and those which are not.

In practically no disputable proximity case is the defendant's wrong the sole cause of the plaintiff's injury. Were every force that intervenes a superceding cause plaintiffs would lose virtually all arguable proximate cause cases. Intervening forces are, by definition, efficient-in-fact—that is, the injury would not have happened without them. But when are they efficient-in-law—legally sufficient to insulate the defendant from liability?

19. 222 Minn. 454, 25 N. W. 2d 221 (1946).
20. 67 Minn. 94, 69 N. W. 640 (1896). *Cf. supra* p. .....

The problem is at bottom: Is the defendant at least partially to blame *for* this injury, or is this other antecedent solely responsible for it? The stage is set psychologically to urge either the efficiency or dependence of an intervening force by either stressing or minimizing its blameworthiness in proof and argument. When the intervening force has a human author this aspect of advocacy is particularly open to development (and sometimes overlooked). The defense counsel should fully develop proof on the enormity of an intervening wrong; the plaintiff's lawyer should be equally alert in capitalizing on proof that minimizes the wrong. The cataclysmic or relatively bland character of an intervening natural force has similar psychological importance. These psychological aspects are not always controlling, but they have had a part in forming some of the legal doctrines which will now be discussed.

Robinson v. Butler[21] is one of the latest Minnesota cases in which the identification of superceding causes was considered. The plaintiff-motorist was forced onto the right-hand shoulder of a two-lane highway when the defendant overtook and passed him in the face of nearby oncoming traffic. A panicky front-seat passenger grabbed the plaintiff's stearing wheel, and pulled the car back onto and across the road where it collided with a telegraph pole.

The court held the passenger's act was an intervening efficient cause, and relieved the defendant from liability for the plaintiff's injuries. After quoting from Mitchell's famous opinion in the *Christianson* case (which *rejected foresight* as a test of proximate cause) nevertheless the court justified its holding that the passenger's act was a superceding cause on the ground that it was *unforeseeable*—that it was not the normal response to the situation created by the defendant and was so extraordinary that it constituted an intervening efficient cause. And since most, if not all, hard issues of remoteness can be analyzed as intervening cause issues, Mitchell's repudiation of the foresight test is no longer a safe guide to advocacy.

The explanation of this re-recognition of the relevance of foresight is rooted in the psychology of the problem. Fact-triers who must ascribe blame tend to try to distinguish between accidental aftermaths of wrongdoing on the one hand, and expected results of wrongdoing on the other. Attempts to escape from the sig-

21. 226 Minn. 491, 33 N. W. 2d 821 (1948). *Cf.* Edbled v. Brower, 178 Minn. 465, 227 N. W. 493 (1929); Fjellman v. Weller, 213 Minn. 457, 7 N. W. 2d 521 (1942); Shuster v. Vechhi, 203 Minn. 76, 279 N. W. 841 (1938); Prosser, 21 Minn. L. Rev. 19, 37-57 (1936).

nificance of foresight in the field of legal remoteness are attempts to escape from our culture.

But nevertheless a foresight criterion is incapable of performing a testing function in the hard cases in which a test is needed. In the *Robinson* case the theory is not inconsistent with a judgment for the plaintiff if the "facts" are "described" a bit more generally.[22] It could be said that the defendant could anticipate that if he forced a car off the road the judgment of its occupants might be impaired so that they would further jeopardize their safety.

This is the dilemma: Foresight is not psychologically irrelevant to the solution of problems of remoteness and often affects the judgment of those who try them. Yet foresight cannot function as a test until the facts of the case are described, and since the facts are nearly always susceptible of differing descriptions which will vary the result, a foresight criterion cannot function in a true testing process.

A realization of this dilemma is of little value to judges—except insofar as knowledge that no definite answer lies this way may send them elsewhere for decisions, jury charges, and rules. But the advocate who must argue such issues in the tradition set by the courts may find the analysis useful in plumbing the inescapable psychology of decision and countering an opponent who makes a noise which purports to be eternal verity.

D. *Uncertainty of Outcome of Remoteness Issue*

The *general rules* of the Minnesota law of proximate cause do not tend to make the law certain. This conclusion comes as no shock to trial lawyers accustomed to this (and many other) uncertainties in damage suits, and who constantly take the perils of litigation into account in negotiations for settlement.[23]

But the statement that general rules have not fostered certainty does not mean that the outcome of remoteness issues is always unpredictable. In some kinds of cases specialized rules and precedents are as sound a basis for prediction as are the rules of any branch of the law.

For example, in the recent Minnesota case of *Benesh v. Garvais*,[24] the plaintiff, injured by the negligence of street car

22. *Cf.* Court's reasoning in Anderson v. Minneapolis, St. Paul & S. S. M. R., 146 Minn. 430; 179 N. W. 45 (1920).

23. "Proximate cause presents questions of extraordinary difficulty; most writers have concluded they cannot be reduced to definite rules." Prosser, 21 Minn. L. Rev. 19, 20 (1936).

24. 221 Minn. 1, 20 N. W. 2d 532 (1945). *Cf.* Homer v. Micholson, 198 Minn. 55, 268 N. W. 852 (1936); Sporna v. Kalina, 184 Minn. 89; 237 N. W. 841 (1931).

operators, sought treatment from a physician who negligently burned her with an electrically operated therapeutic device. One issue was: Were these burns proximately cause by the negligence of the carmen? The court cited eight similar Minnesota cases in which an original wrongdoer was held to have proximately caused further injuries resulting from medical treatment, and stated that the law on this point should be considered settled. The court has recently affirmed its well-known view that lack of a driver's license is not the proximate cause of injuries resulting from unlicensed driving.[25] The court has also recently held that the negligence of one person imperilling a second is the proximate cause of injuries to a reasonable rescuer coming to the aid of the second.[26] No doubt other examples will occur to experienced lawyers, and one could find many more by spending a short time in routine research.

Proximate cause cases are often unique and precedents closely in point will not be found. Common sense is some guide to the likelihood of finding precedents and specialized rules. Some cases are so patently unusual that the experienced counsel knows off-hand that he is unlikely to find authority closely in point. Others are obviously of a kind that are so likely to recur that protracted search is almost sure to yield up authority. The danger of too little research is usually greater than the danger of wasting time. Research should not be confined to local materials. Most courts, and the Minnesota Supreme Court is no exception, pay some attention to decisions in other jurisdictions on hard questions of proximity.[27]

One recently formulated Minnesota specialized rule deserves special mention. In *Medved v. Doolittle*[28] the car which carried plaintiff's decedent crashed into a disabled truck wrongfully left on the highway. The driver of the car, decedent's husband, testified that he saw the truck when over a half a mile from it and noted that the intervening distance was shrinking rapidly, but nevertheless he supposed the truck was moving and failed to keep a proper lookout. About 500 other cars passed the truck without incident on the two unblocked lanes of the three lane highway. The trial court submitted the proximate cause issue to the jury which returned a verdict for the plaintiff.

The Supreme Court reversed on the ground that the negligence

25. Mahowald v. Bechrich, 212 Minn. 78, 2 N. W. 2d 569 (1942)
26. Duff v. Bemidji Motor Service Co., 210 Minn. 456, 299 N. W. 196 (1941).
27. *E.g.*, Medved v. Doolittle, 220 Minn. 352, 19 N. W. 2d 788 (1945); Fjellman v. Weller, 213 Minn. 457, 7 N. W. 2d 521 (1942).
28. *Cf.* Kulla v. E. B. Crabtree Co., 203 Minn. 105, 280 N. W. 1 (1938).

of the husband was a superceding cause. The court stressed the husband's discovery of the truck in time to avert the accident and his subsequent negligence, and distinguished the case from others in which the obstruction was not discovered. The court then formulated a rule to this effect: If a negligent act[29] of a third party intervenes between the defendant's wrong and the plaintiff's injury, and if the third party has discovered the facts constituting danger and thereafter fails to exercise reasonable care, then the third party's misconduct is a superceding cause.

This rule of the *Medved* case is definite enough to control decisions in a limited area. If the Supreme Court continues to respect it then one area of the law of proximate cause will become relatively certain in Minnesota. But will the rule stand?

A similar, though more drastic, rule once had considerable vogue. In *Vicars v. Wilcox*[30] an English court formulated a "last wrongdoer" rule which insulated defendants from liability whenever the wrong of another intervened between their misconduct and the plaintiff's harm. That rule has been repudiated in nearly all jurisdictions, including Minnesota.[31] It operated too arbitrarily. Often it relieved wrongdoers who, in common judgment, were clearly at least partially to blame *for* the plaintiff's injury.

This same sort of dissatisfaction may develop with the less drastic, but still arbitrary, discovered-peril rule of the *Medved* case. The decision of that case is not unacceptable when the facts of the flagrance of the husband's wrong and the slight fault of the defendant are kept in mind. But there will be other cases in which the original wrongdoer will be guilty of more serious fault and the intervening wrongdoer will be less culpable. Perhaps such cases will tempt the court to modify or abandon the rule as now formulated.[32]

29. *Cf.* Arnold v. Northern States Power Co., 209 Minn. 551, 297 N. W. 182 (1941) in which the intervening wrong was a failure to act.

30. 8 East 1 (1806).

31. *Cf.* Edblad v. Brower, 178 Minn. 465; 227 N. W. 493 (1929); Arnold v. Northern States Power Co., 209 Minn. 551, 297 N. W. 182 (1941); Butler v. Northwestern Hospital, 202 Minn. 282, 278 N. W. 37 (1938); Walker v. Stecher, 219 Minn. 152, 17 N. W. 2d 317 (1944); Hall v. Minneapolis St. R., 223 Minn. 243, 26 N. W. 2d 178 (1947); Ellis v. Lindmark, 177 Minn. 390, 225 N. W. 395 (1929); Roadman v. C. E. Johnson Motor Sales Co., 210 Minn. 59, 297 N. W. 166 (1941). See Prosser on Torts, pp. 243-249, 316 (1941).

32. On the other hand a similar formulation has been used for years in Minnesota in judging whether the plaintiff's contributory negligence remains a proximate cause of his injury if the defendant, after discovering his peril is therafter negligent. See Seward v. Minneapolis St. R., 222 Minn. 454, 25 N. W. 2d 221 (1946); Fonda v. St. Paul City R., 71 Minn. 438 (1898). This is, of course, quite a different problem when viewed from the vantage point of public policy.

Counsel should be cautious in either banking on or disregarding this rule.

III. Liability When Misconduct Does Not, in Fact, Cause Harm

The actual cause problems discussed in section I occured in cases in which clearly the defendant was not to blame *for* the plaintiff's injury unless the injury was, in fact, an effect of the defendant's misconduct. The remoteness problems discussed in section II usually occur in cases in which the plaintiff's injury is, in fact, a consequence of the defendant's misconduct. Since these two types of cases nearly exhaust the field, it is almost accurate to say that a causal-relation-in-fact is a prerequisite of liability. But there are exceptions and qualifications.

In a recent California case[33] two of three hunting companions simultaneously and independently mistook their fellow for game and each fired at him. One pellet of shot entered his eye. The plaintiff, of course, could not prove which defendant hit him. The court had two alternatives: relieve both blameworthy defendants or hold both. It chose the latter, which seems the more sensible. But one of the defendant's misconduct did not, in fact, cause the injury.[34]

The connection-in-fact between misconduct and harm is not strictly causal when two independent forces, each of which would have produced the whole injury alone, strike simultaneously or after merging. It cannot be said that both or each in fact caused the harm, since the harm would have occurred if either were absent. It cannot be said that neither in fact caused the injury because the injury would not have happened if both were absent. All that can be said is that either would have caused the injury if the other were absent—which means each would have been a cause under other circumstances.

Nevertheless appropriate legal disposition of many of these cases is quite clear. In the classical case of *Corey v. Havener*[35] two motorcyclists simultaneously frightened the plaintiff's horse. The acts of either probably would have caused results as dire had the

33. Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (1948).

34. In the similar case of Oliver v. Miles, 144 Miss. 832, 110 So. 666 (1926) the court reached the same result. The plaintiff was a stranger to the hunting party and the court was able to dub the two hunters "joint enterprisers" and thus justify liability on an agency theory. This approach was not open to the California Court in the *Tice* case. The California plaintiff was a member of the hunting party; and if the defendants were liable for each other's wrong as joint enterprisers, the plaintiff would also be barred by his vicarious responsibility as a joint enterpriser.

35. 182 Mass. 250, 65 N. E. 69 (1902).

other been absent. The court had no difficulty in holding them both to blame *for* the plaintiff's injuries as cotortfeasors.

But cases are not always so simple. The fact that the harm would have occurred without the defendant's misconduct sometimes throws great psychological doubt on whether the defendant was to blame *for* the harm, and that doubt is reflected in the cases. The Minnesota court was confronted with a knotty problem of this sort in *Anderson v. Minneapolis, St. P. & S. S. M. R.*[36] A great fire and a small fire, after merging, swept onto the plaintiff's land. Arguably the great fire was not set by the defendant. The plaintiff probably would have suffered devastating loss if the defendant's fire had never been set. The Supreme Court approved a submission of the case to the jury under instructions to the effect that if the defendant's fire was a material or substantial element in causing the plaintiff's damages, then the defendant was liable. This instruction seems to be calculated to turn the jury loose with a hard problem of ascribing blame. Some courts have attempted to develop specialized rules for this sort of case, which have the advantage of stabilizing the law and controlling the jury, but at the same time produce arbitrary results.[37]

In these multiple cause cases the central problem is: Should the defendant be held to blame *for* the injury, even though, in an abstract sense, causal connection in fact is absent. Such issues are sometimes easy and sometimes hard. They are problems, at base, of the appropriate legal consequences to be attached to the thoroughly understood facts; and, as such, they resemble problems in remoteness, rather than problems of actual cause which are solved by proof. Defense counsel should be prepared and permitted to stress lack of the cause-consequence relationship—that lack is not totally irrelevant; it bears on, but does not foreclose, the lack of the blame-*for* relationship. But the possibility of liability transcending the limits of harm which would have occurred even if the defendant had not been guilty of misconduct inheres in the nature of the blame-*for* relationship.

IV. Minnesota Analyses—Actual Cause Problems or Remoteness Problems

Normally the character of actual cause problems differs so patently from the character of remoteness problems that likelihood

36. 146 Minn. 430, 179 N. W. 45 (1920).
37. *Cf.* Kingston v. Chicago Northwestern R., 191 Wis. 610, 211 N. W. 913 (1927).

of confusion is small. But a few modern Minnesota cases are puzzling and deserve special analysis.

In *Geisen v. Luce*[38] the plaintiff was injured in an automobile accident. The defendant had left his stalled car on the highway in violation of statute but under circumstances which justified his conduct. The plaintiff was a passenger in a car which approached the stalled car from the rear. The driver of the plaintiff's car was travelling at a high rate of speed, and, even though his view ahead was obstructed, he pulled over to the left side of the road to pass the stalled car. A car was coming from the opposite direction and the plaintiff's host saw that a head-on collision was imminent. The stalled car obstructed the right side of the road, so the host pulled off the highway to the left and the car upset.

The Supreme Court held that the defendant was not liable. This result was justifiable on two grounds: (1) defendant was not negligent; and (2) even if he were, the host was guilty of such serious fault that his wrong was a superceding cause. But the court also announced this theory: The accident would have happened even if the stalled car had been moving slowly. In fact, were it moving slowly, passing time would increase and danger would be prolonged. Since slow movement was not forbidden by statute there was no causal connection-in-fact between the breach of statute and the accident.

Of course more time is needed to pass a moving car than a stalled one. But it does not follow that cars parked on the highway do not constitute an undesirable passing hazard. And it does not follow that if a parked car were not parked it would be moving slowly. The cause-in-fact relationship between leaving the car on the road and the upset was sufficient for liability. The sound bases for deciding for the defendant were lack of negligence and remoteness.

This conclusion is buttressed by the later decision of *Fleenor v. Rawley*.[39] In that case the plaintiff's host collided with the defendant's car wrongfully left on the highway to avoid a head-on collision with a car approaching from the opposite direction. The court was not willing to reason that this defendant too should escape liability on the ground that the collision would have happened even if the defendant's car had been moving slowly. Such a result would have been unpalatable because this defendant was clearly at fault and

38. 185 Minn. 479, 242 N. W. 8 (1932).
39. 198 Minn. 163, 269 N. W. 370 (1936). See also Bartley v. Fritz, 205 Minn. 192, 285 N. W. 464 (1939).

the negligence of the plaintiff's host was not as flagrant as that of the host in the *Geisen* case. The defendant was held liable. However the court did not repudiate the troublesome reasoning in the *Geisen* case. The court distinguished the cases on the ground that in the earlier case the host left the road and in the later case the host collided with the defendant's car. The court says that movement increases the danger to passing cars but decreases the danger of rear-end collision. But in either event the increase or decrease of risk is insignificant if the slow movement is slow enough.

The analysis of *Draxton v. Matzmerek*[40] might cause similar trouble. The defendant approached and drove through an intersection at a speed between 15 and 20 miles per hour. The speed limit within fifty feet of and through obstructed intersections was 15 miles per hour. The plaintiff, a small boy, was coasting down the intersecting street that ran at right angles to the defendant's path. A heavy snow had fallen, and plowing had piled up banks high enough to hide the "belly busting" plaintiff from the approaching defendant's view. Plaintiff collided with the defendant's rear bumper. One of the issues was: Was the defendant's wrongful speed a proximate cause of the accident?

Evidence tended to show that the speed of the car was only causal in the sense that it happened to get the car to the site of the accident; it did not deprive the defendant of opportunities he might otherwise have had to avoid the imminent accident. In other words, the accident was, at most, a consequence of the speed, rather than an effect of it.

The Supreme Court held that the speed was not a proximate cause of the injury—a holding with which I have no quarrel. Much of the opinion is couched in terms which classify the accident as a remote consequence of the speed, and therefore a consequence for which the defendant was not liable—analysis which is certainly justifiable.

Some of the language used in the opinion might be interpreted to mean that the accident was not even a consequence-in-fact of the defendant's negligent speed. The court stresses proof that if, at the time the defendant entered the intersection, his speed had been instantaneously reduced far below the speed limit, the plaintiff would have collided with the car anyway. The distance between the curb line and the accident is not given in the opinion, but was probably only a few feet. The evidence did show that the defendant had been exceeding the speed limit for at least fifty feet before he

40. 203 Minn. 161, 280 N. W. 288 (1938).

reached the curb line. This focus on the last few instants before the accident, coupled with the implicit exclusion of prior events, gives the idea of cause a queer twist. In almost every collision case at some small distance from the crash an instantaneous reduction to permissible speed would not prevent collision. So if such an analysis were pressed to its logical conclusion negligent speed could hardly ever cause a collision. The proper analysis of the *Draxton* case is to view it as a problem involving the distinction between proximate and remote consequences; it cannot be disposed of on the basis that the collision was no consequence at all.[41]

This point can perhaps be clarified by considering the famous Minnesota case of *Bibb Broom Corn Co. v. Atchison, Topeka, & Santa Fe R.*[42] The defendant railroad was negligent in failing to inform a connecting carrier that a carload of goods was in the Kansas City yards. This negligence delayed the shipment until the goods were overtaken by an extraordinary flood. The Kansas City yards were not, ordinarily, a dangerous place. Only by coincidence was the loss a consequence of the negligence. Had the defendant happened to make the mistake at another time no such injury was likely. And had the goods happened to have been hauled into the yards a few days later they would have been destroyed just as they were even though notice were given promptly. And yet the Supreme Court found sufficient connection in fact for liability—as have many other courts in similar cases.[43] The quality of the relation in fact between the defendant's wrong and the plaintiff's injury in the *Bibb* case does not differ from that in the *Draxton* case. In both cases the problem is one of the legal proximity or remoteness of a factual consequence—and the cases are different when viewed as problems in determining what consequences entail liability.[44]

41. "... If defendant drives through St. Paul at sixty miles an hour, and arrives in Minneapolis in time to be struck by a falling tree, his speed is clearly a cause of the accident, since without it he would not have been there when the tree fell; if he is not liable to his passenger, it is because his negligence did not extend to such a risk. The term 'proximate' is applied to these more or less undefined considerations which determine liability, even where the fact of causation is clearly established." Prosser, 21 Minn. L. Rev. 19, 22-23 (1936).

42. 94 Minn. 269, 102 N. W. 709 (1905).

43. *Accord:* Green Wheeler Shoe Co. v. Chicago, Rock Island & Pac. R., 130 Iowa 123, 106 N. W. 498 (1906). The older authorities are well marshaled in the *Bibb* case itself. Prosser is critical of the result and states authorities contra, 21 Minn. L. Rev. 19, 52 (1936).

44. The factual relation cause-consequence between defendant's misconduct and plaintiff's injury is sometimes also suppressed by calling the results of defendant's misconduct "condition," rather than causes. See Hamilton v. Vare, 184 Minn. 580, 239 N. W. 659 (1931).

V. Public Policy and Causation

In these times legal writers are prone to display a lively interest in the justification or criticism of the workings of the law in action. But in some areas not much of profit can be said about public policy. Causation seems to me to be one such area. Though others have often said that problems of remoteness are at bottom problems of policy, little that has been written throws much light on how causation problems can best be solved to serve society.[45] The reasons for the sterility of a policy approach may be of interest.

Deeply rooted in our culture is the postulate that a wrongdoer should have to pay only for the harm he does. That notion seems so natural and right that other alternatives seldom occur to us. An injury that does not happen to have a significant relation in fact to a wrongful act is not likely to have a significant relation in law to it. We would think it arbitrary, disorderly, or unworkable to allow an injured person to elect just any wrongdoer as a candidate for liability. Nor would we be happy with some system in which injuries and misbehavior were aligned on a chance scheme of numbering, alphabetizing, or propinquity.

The law of remoteness may relieve a defendant from liability even though the plaintiff's harm is, in fact, a consequence of that wrong. Some say that non-liability for remote consequences is justified on the theory that responsibility should be neither too great in size nor too persistent in time. Were this the central policy problem of the law of remoteness it would merit extended discussion. Courts have been concerned with holding responsibility within reasonable time and space bounds, but only occasionally have they couched this concern in terms of remoteness. More typically a proximity problem involves a claim of no tremendous proportions and for harm that culminated not long after the defendant's misconduct.

For example in *Gilman v. Noyes*[46] the defendant left the plaintiff's gate open, and the plaintiff's sheep strayed and were eaten by bears. Even if the bears were licking their chops within an hour, and even if the sheep were worth only a few dollars, this case would still involve a problem of remoteness. The central question of the case is: Is the defendant to blame *for* this kind of loss? The unusual quality of the relationship between the defendant's wrong and the plaintiff's injury sets off this bother. A similar unusual quality is noted when damage is unbelievably great or when slow and tortuous workings of fate connect a wrong and loss. But most

45. *E.g.*, Prosser, 21 Minn. L. Rev. 19, 22, 27, 33 (1936).
46. 57 N. H. 627 (1876).

of the cases involve neither exceptionally large nor greatly delayed injuries.

Our acceptance of the notion that the blame-*for* relation is a proper measure of responsibility is reflected in both (1) the usual requirement that the defendant's misconduct be related in fact to the plaintiff's injury, and (2) the limitation of liability to "proximate" consequences. If the blame-*for* relation is our starting point it is not unnatural that whenever the ordinary layman is uncertain about the existence of that relation, the law, too, is infected with the same uncertainty. Decisions of cases resolve such doubts and when closely similar cases arise thereafter the doctrine of stare decisis tends to stabilize the choices previously made. Courts may also reduce uncertainty for wider areas as they formulate principles with sufficient meaning to test remoteness and proximity. But these stabilizing forces have never operated extensively. Remoteness cases are likely to be unique, because the queer case is likely to raise a problm of remoteness.

There is, and there will probably continue to be, a large area in which remoteness issues can be decided for either litigant. Nevertheless the population of this area is insignificant when compared to the number of damage suits in which causation issues are not in dispute. The policies that justify tort liability when no causation issue is disputed will be relatively unaffected by the decision of remoteness issues one way or the other. The beneficial effects of the law of torts as an instrument of social control and security are themselves limited; and other institutions must take up where the law of torts leaves off. That the legal boundary between remote and proximate consequences should be fringed or vague seems inevitable; and in cases close to the boundary there are no very potent policy reasons that bear on the decision.

VI. Conclusions

The highlights of the implications of this paper that may be most important to the Minnesota advocate are:

1. The advocate must discriminate clearly between two kinds of causation issues: (1) cause-in-fact and (2) remoteness or proximity. The former involve problems of proof, and must be prepared as problems of proof. The latter involve problems of argument and must be prepared as problems of argument. Normally the distinction is easily made, but in a few situations Minnesota precedents tend to make the discrimination more difficult.

2. The development of proof on an issue of cause-in-fact is

sometimes routine, but such an issue often opens opportunities for understanding ingenuity in the use of eye-witnesses, experts, and circumstantial evidence and the like. In many of these cases the successful advocate becomes a master of non-legal materials.

3. In developing arguments on a problem of remoteness counsel should keep in mind the common sense form of putting the problem: Is the defendant to blame *for* this particular harm? This way of looking at the proximate cause problem often supplies clues to proper argument on both the psychological and doctrinal levels.

4. In all jurisdictions, and Minnesota is no exception, the general definitions of proximate cause have insufficient descriptive power to function as tests. Of course the court has from time to time settled on appropriate jury charges, and the definitions of proximate cause that will pass muster when the issue is submitted to a jury can be found in the cases. It has changed from time to time and may change further. In all arguable cases the outcome is not uncertain. Precedents and specialized rules tend to settle the law of remoteness for the kinds of cases that recur. Nevertheless many remoteness cases are unique, and cannot be settled in advance.

5. Though in most remoteness cases the plaintiff's injury is a consequence-in-fact of the defendant's misconduct, nevertheless there are some areas in which a defendant is held to be to blame *for* the plaintiff's injury even though from some abstract point of view it could be argued that the injury is not a consequence-in-fact of the defendant's wrong. The blame-for relationship is a superior clue for the advocate.

6. The policy justifications for tort liability seldom have much bearing on determining the close questions on the scope of liability. Of course no case is only a proximate cause case, and policy arguments may buttress positions for and against liability on some other aspect of the damage suit. These arguments may have a psychological effect that exceeds their validity which opposing counsel may find hard to combat. If the tribunal can be made to see the issue clearly as an issue of the scope of liability, the irrelevance of policy arguments to solution may also be made clear.

One important facet of advocacy has not been discussed in the body of this paper—the compelling difference between representing claimants and defending against claims. The plaintiff's lawyer in all damage suits has, as a major objective, judgment at the trial without reversible error. He and his client usually can ill afford retrials. His over-all strategy is "safety first." He should forego all

doubtful advantages that fall short of being crucial. He must be on well-approved ground in his plan of proof on actual cause issues. He can seldom afford the security of directed verdicts on issues of remoteness. Of course defense counsel makes no foolhardy experiments, but victory at the trial has tremendous tactical value for him, and he can afford some chances of reversal to obtain it.