PROXIMATE CAUSE IN NEGLIGENCE LAW: HISTORY, THEORY, AND THE PRESENT DARKNESS

PATRICK J. KELLEY*

I. DEDICATION

Frank Miller is a generous man. In his professional career, he has given unstintingly to three separate groups. To the legal community, he has given seminal works of scholarship marked by honesty, analytical rigor, and a deep respect for the facts. To his students, he has given an example of and an incentive to careful analysis, clear statement, and meticulous preparation. To his friends, he has given his encouragement, his support, and his obstinate loyalty.

Frank's primary scholarly contributions have been in the areas of criminal law and criminal procedure, but early on in his career he collaborated with Arno Becht on a book about factual causation in negligence and strict liability cases.[1] The book reflects Frank and Arno's shared commitment to analytical rigor, clarity, and honesty. Venturing into a field beset with puzzles and confusion, Frank and Arno started with a limited number of basic assumptions, hammered out a set of analytical tools, and used them to categorize and pick apart a number of problem cases, bringing to clarity much that was obscure.

This essay, on the equally puzzling related topic of proximate cause, is dedicated to Frank Miller, in the sure and certain knowledge that he will disagree with much of it, but in gratitude for his friendship, example, encouragement, and loyalty.

II. THE PRESENT DARKNESS

In negligence cases, our courts require the plaintiff to prove that the defendant's negligence was a "proximate cause" of the plaintiff's injury. Modern tort theorists have lavished seemingly boundless attention on the

* Professor of Law, Southern Illinois University School of Law, B.A, Notre Dame University, J.D., University of Iowa.

1. A. BECHT & F. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961).

problem of explaining proximate cause,[2] but the consensus of law students and others is that proximate cause remains a hopeless riddle.[3] Proximate cause is not an easy concept to understand. For one thing, defendant's negligence may be a *cause* of plaintiff's injury without being a *proximate* cause. One way to get at least a preliminary understanding of the meaning of proximate cause is to look at some typical cases. Two Massachusetts cases from the nineteenth century show how courts use the proximate cause language.

In *Denny v. New York Central Railroad*,[4] a railroad company negligently delayed shipping plaintiff's wool from Syracuse to Albany. When the wool reached its final destination in Albany, the railroad stored it in a warehouse, awaiting pick-up. A sudden, extraordinary flood engulfed the warehouse and damaged the wool. The court held that the railroad company was not negligent in storing or safeguarding the stored wool in Albany. The railroad was, therefore, not liable for the flood damage, even though the wool would not have been damaged had the railroad shipped it promptly from Syracuse to Albany: If it had arrived on time, the wool would have been picked up from the warehouse before the flood. According to the court, since the flood that harmed the wool happened after the wool was carried to Albany, the flood itself was the proximate cause of the harm.[5] The railroad's negligence in delaying the shipment to Albany was deemed "remote," since "it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried on beyond Syracuse."[6]

In *Carter v. Towne*,[7] an 1870 case, a storekeeper sold a pistol, a box of percussion caps, and two pounds of gunpowder to a nine-year old boy, who took them home. His aunt, baby-sitting him, saw the gunpowder, caps, and pistol. With her knowledge and approval, he put them in a cupboard. A week later, on July 4, plaintiff's mother took the pistol and some of the powder from the cupboard and gave them to the boy, who

2. *See, e.g.*, Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 343 (1924); L. GREEN, THE RATIONALE OF PROXIMATE CAUSE (1927); James & Perry, *Legal Cause*, 60 YALE L.J. 761 (1951). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 250 (4th ed. 1971).

3. See the comment addressed to the student in a widely-used torts casebook. After presenting the leading modern proximate cause cases the authors ask: "Does all this leave you with an ache or a pain somewhere?" W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS IN TORTS 335 (7th ed. 1982).

4. 79 Mass. (13 Gray) 481, 74 Am. Dec. 645 (1859).

5. *Id.* at 487, 74 Am. Dec. at 648.

6. *Id.*

7. 103 Mass. 507 (1870).

celebrated Independence Day by shooting off approximately a pound of the powder in the pistol. Four days later, the boy took a quarter-pound flask of the gunpowder from the cupboard without his mother's knowledge. He fired a trail of powder leading to the flask and was burned when it exploded. On these facts, the court directed a verdict against the nine-year old plaintiff in favor of the defendant storekeeper. In affirming the trial court, the appellate court emphasized that the gunpowder sold by the storekeeper to the child had been in the custody and control of his parents or his aunt for more than a week before the accident. The injury was therefore not a "direct or proximate" consequence of the defendant's negligent act of selling gunpowder to a minor.[8]

These cases, and others like them, raise some difficult questions. What does it mean to say that the railroad's negligent delay in shipping, or the storekeeper's sale of gunpowder to a child, is a cause but not a proximate cause of plaintiff's harm? Why limit liability to conduct that is a "proximate" cause? Why not extend liability to the harm caused by the railroad's and the storekeeper's negligent conduct, for example? What test does the court use to determine proximate cause? How, for example, did the court know that the railroad's delay in shipping was not an "active, efficient and prevailing cause" of the harm? How, for example, did the court know that the storekeeper's sale of the gunpowder to the child was not a "direct" cause of the child's subsequent injury? When we turn to the two leading American torts treatises for answers to these questions, we find only puzzles and confusion.

Both the Prosser and Keeton Handbook[9] and the Harper, James and Gray Treatise[10] agree that proximate cause has nothing to do with causation and little to do with proximity. Thereafter, the two treatises part company. Harper and James say that proximate cause is a misnomer, and that what the courts are really referring to is the scope of duty in negligence cases.[11] And they have a position on the scope of duty question. They say that the defendant's duty in a negligence cases should be limited to harm caused by the unreasonable foreseeable risk that made the defendant's conduct negligent in the first place. Thus, Harper and James would say in *Denny* that the destruction of plaintiff's wool by a flood is not a foreseeable risk that made the railroad's delay in shipping

8. *Id.* at 509.
9. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).
10. 4 F. HARPER, F. JAMES, JR. & O. GRAY, THE LAW OF TORTS (2d ed. 1986).
11. *Id.* at 137-43.

the wool negligent in the first place. The rationale for this limitation on defendant's duty is simple. The basis for liability in negligence is that defendant's conduct posed an unreasonable foreseeable risk of harm to others. It makes sense then to limit liability to harm caused by the foreseeable risk of harm that made that conduct negligent in the first place.[12]

Harper and James recognize that "foreseeability" is an elastic concept.[13] Could you not say, for example, that a flood, or some harm to stored goods is "foreseeable" in *Denny*? Could you not say, for example, that harm to a child purchaser is foreseeable even after parental notice in *Carter*? They welcome that elasticity, however, for it makes easier the desired change from a fault system with liability for harm caused by unreasonable foreseeable risks to a no-fault compensation system with liability for harm caused by the inherent risks of an enterprise.[14]

Prosser and Keeton, on the other hand, argue that the proximate cause question is ultimately a question of legal policy: "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred."[15] They understand proximate cause as "the term . . . applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established."[16]

After elaborating their legal policy explanation of proximate cause, Prosser and Keeton discuss the two recurring theories of proximate cause. One theory limits liability to the "foreseeable harm" from defendant's conduct, and the other theory limits liability to the "direct consequences" of the defendant's conduct.[17] Neither of these theories provides a good guide to predicting the results in particular cases, they say, because each makes use of a flexible concept—"foreseeability" in the one theory and "directness" in the other—that leaves an ultimate evaluative judgment to the court or to the jury.[18] The broad leeway given by these flexible concepts, moreover, allows the court or jury to justify results that seem to be exceptions to the theories as applications of the theories themselves.

---

12. *Id.* at 137-47.
13. *Id.* at 167-69.
14. *Id.* at 169.
15. W. KEETON, *supra* note 9, at 273.
16. *Id.*
17. *Id.* at 274, 280-96.
18. *Id.* at 274, 294-95, 297-300.

Prosser and Keeton argue that "duty" language is not necessarily better than "proximate cause" language in analyzing these questions, since under either approach the question boils down to an evaluative judgment by the court or the jury.[19] Analysis in terms of "duty" is marginally better than analysis in terms of "proximate cause" because the duty language emphasizes policy choices by the decisionmaker about the scope of the legal liability.[20] It is therefore less likely to mislead people into thinking the ultimate decision is policy-free. Prediction of actual results, according to Prosser and Keeton, is best achieved by ignoring theories altogether and focusing on the prior cases most like the current case on the facts and in the nature of the tribunal.[21]

Each treatise criticizes the position of the other. Harper and James criticize purported policy explanations of proximate cause that never identify the policies actually in play.[22] Prosser and Keeton acknowledge that the foreseeable risk test of proximate cause has gained widespread acceptance, but criticize the foreseeable risk theory as too flexible to be a meaningful guide to decisions or to predicting results.[23] They believe that explanations using foreseeability language merely hide the ultimately evaluative policy judgments that must be the real basis for proximate cause decisions.[24]

The criticisms the treatises level at each other are persuasive. Prosser and Keeton say that the question in each case is an evaluative judgment, but they recognize that the courts seem to apply the foreseeable risk test. The closest Prosser and Keeton come to a policy justification for that widespread test, however, is in reporting the three justifications others have given for the test: (1) it is rational to use the same factors that define negligence (unreasonable foreseeable risk) to limit liability for negligence; (2) it is easier to administer than other tests, "since it fixes the nearest thing to a definite boundary of liability which is possible";[25] and (3) it is more just than other tests, as it precludes liability out of all proportion to defendant's fault. But their further analysis undermines each of these as a general policy underlying application of the foreseeable risk test. If "foreseeable risk" is an inherently open-ended concept, using the

19. *Id.* at 274.
20. *Id.*
21. *Id.*
22. 4 F. HARPER, F. JAMES JR. & O. Gray, *supra* note 10, at 131.
23. W. KEETON, *supra* note 9, at 274, 281-84, 297-300.
24. *Id.*
25. *Id.* at 282.

concept twice in deciding a negligence case (once on the negligence issue and once on the proximate cause issue) may seem rational but it still fails to provide an effective guide to decision or to prediction. "Foreseeable risk" does not provide a definite boundary to liability, as its open-endedness simply invites an unconfined policy judgment by the court or jury. The policy of placing some limit on potentially crushing and limitless liability would be forwarded by any limiting test. The open-ended foreseeable risk test provides no consistent limitation, and leaves the ultimate limiting decision to the court or the jury, which can make it on policy grounds other than the need to limit potentially crushing liability.

Harper and James, on the other hand, accept the foreseeable risk test as an appropriate test of the scope of duty in negligence cases. They welcome, rather than deplore, its flexibility, because that flexibility makes it easier to shift from a fault-based system with liability for unreasonable foreseeable risk to a compensation system with liability for the inherent risks in the defendant's enterprise.[26] Harper and James' proposed manipulation of the prevailing proximate cause test to further their policy goals thus seems to confirm Prosser and Keeton's claim that the foreseeable risk test is so open-ended that it necessarily masks an underlying evaluative policy judgment by the person applying it.

Why do we have this apparent intellectual impasse? How did we come to this?

III. THE EARLY HISTORY OF PROXIMATE CAUSE IN NEGLIGENCE LAW

A. Bacon's First Maxim and The Assumption of Continuity in Developing Substantive Law

If we approach legal history with the assumption that today's substantive law developed out of an earlier, more primitive, but nonetheless embryonic substantive law, we could trace the apparent pedigree of modern proximate cause doctrine back to the early seventeenth century and Francis Bacon's first maxim: "In jure non remota causa, sed proxima spectatur" (In law not the remote, but the proximate cause is looked at).[27] Bacon was a learned man, classically trained. The term "proxi-

26. 4 F. HARPER, F. JAMES, JR. & O. GRAY, *supra* note 10, at 169.

27. F. BACON, A COLLECTION OF SOME PRINCIPAL RULES AND MAXIMES OF THE COMMON LAWS OF ENGLAND, in THE ELEMENTS OF THE COMMON LAWS OF ENGLAND (1630 and photo reprint 1978), Regula 1, at 1.

mate cause" had a definite meaning in medieval scholastic philosophy.[28] One might trace the modern proximate cause doctrine through Bacon, then, back to medieval scholasticism. Moreover, Bacon's explanation of the reason for this maxim has a curiously modern ring to it. "It were infinite for the law to judge the causes of causes, and their impulsions one of another," Bacon said, "therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree."[29] Bacon's first maxim thus seems to be an important milestone in the history of proximate cause, as it seems to point backward to medieval scholasticism for its origin and forward to modern policy reasons for its justification. The historian of proximate cause rejoices upon discovering Bacon's first maxim.

Celebration, however, would be premature. Two facts suggest that Bacon's first maxim is not a milestone at all. First, one can find no substantive rules in the law of trespass or trespass on the case before or after 1630 that embody Bacon's proximate cause maxim. Instead, we find common law courts in the mid-nineteenth century, in the newly-developed negligence cause of action, suddenly talking about proximate cause as an important doctrine[30] and citing Bacon's first maxim.[31] Second,

---

28. The scholastic distinction of the Aristotelian efficient causes into "proximate" and "remote" causes was based primarily on the notion of the *power* or *capacity* of the "proximate" cause to bring about a particular effect, as opposed to the "remote" cause which was merely a necessary condition without the capacity or power to bring about the effect. The scholastics often used the example of the father and the grandfather to explain the distinction. As Nicholas St. John Green, quoting initially from Burgesdyk, explained it:

> "a father depends upon ancestors in begetting his son, and in this way every proximate cause upon the remote." [quoting Burgesdyk] That is, the remote cause is necessary for the existence of the proximate; but the proximate itself contains the whole causal power, and does not derive it from the remote. Thus if there had been no grandfather, there would have been no grandson; but no power of the grandfather was instrumental in the begetting of the grandson.

Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201, 207 (1870), *reprinted in* 9 RUTGERS LAW REV. 452, 457 (1954).

This distinction between those necessary conditions with the power or capacity to bring about a particular result and those without such power could be readily applicable to explain proximate cause cases. Take *Denny*, for example. The delayed transportation of the wool, a necessary condition of damage by flood after late arrival, does not have the power or capacity to cause damage by adventitious flood. It is a different matter, however, when the shipper of apples delays shipment of apples in the fall, for then the delay has the capacity to bring about damage to the apples from freezing due to the onset of winter. 73 N.Y. 365, 29 Am. R. 169 (1878). Or take *Carter*, for example. The sale to the minor was a necessary condition of the harm, but after the intervention of the minor's aunt and mother, the sale lost its capacity to bring about the harm.

29. F. BACON, *supra* note 27, at 1.

30. *See infra* text accompanying notes 78-99.

closer examination of the examples Lord Bacon gives of his first maxim suggests that the maxim was intended as a way of understanding and perhaps categorizing a set of seemingly disparate legal rules, primarily drawn from the land law.[32] Not one of the examples Bacon uses to illustrate this maxim is from what we would now call a tort personal injury case: there is no example from the law of trespass or of case.[33] The only intentional harm case Bacon cites is a criminal case, to which he says the maxim does not apply.[34]

We need to look carefully at what Bacon was trying to do with his maxims. His preface and the body of the work itself suggest that he included two kinds of maxims in this work—generally accepted legal maxims and what we might call analytical maxims. The analytical maxims, like his first maxim, were attempts at stating *legum leges*—the law of laws—generalized or common denominator explanations for a number of specific rules. Bacon attempted to identify and report certain formal similarities between different doctrines of the common law.[35] Bacon's was a peculiarly scientific approach to the law, attempting to find common structures or principles underlying a range of widely divergent legal rules. Ironically, given Bacon's aim, his failure to refer to any rule of trespass or of case as an example of the first maxim constitutes strong evidence that neither in trespass nor in case was there a formal rule like our modern proximate cause doctrine.

The search for an embryonic, primitive proximate cause doctrine in the early common law thus comes to an ironic conclusion. What at first seemed to be the key to a coherent historical explanation of the continuous development of proximate cause doctrine in tort law from the early common law to today turns out to be strong evidence against such a continuous development. Modern proximate cause doctrine intort law seemed to spring up, without identifiable tort law antecedents, in the

31. *See, e.g.*, Sneesby v. the Lancashire & Yorkshire Ry, Co., 9 L.R.-Q.B. 263 [1874], at 267 (Blackburn, J.).

32. *See* F. BACON, *supra* note 27, at 1-6.

33. Frederick Pollock commented on this as well. F. POLLOCK, THE LAW OF TORTS 27, n.i (1887).

34. F. BACON, *supra* note 26, at 4.

35. Because these formal categories were not necessarily the reasons for the rules he classified under them, and the substance of the law he attempted to classify was accretion on custom, filtered through a web of procedures, his analytical maxims are peculiarly unhelpful for understanding or working with the common law of his time. It is more helpful to read Coke on Littleton. E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON (1628).

middle of the nineteenth century. The assumption of continuity in the development of substantive law seems not to work for the history of proximate cause. A different historical explanation, based on different assumptions, seems necessary.

B. The Recent Emergence of a Substantive Common Law

The historical studies of S.F.C. Milsom[36] go a long way toward explaining our inability to trace the modern substantive proximate cause doctrine back to the common law before 1800. Milsom points out that the early common law was a law about pleadings: it was not substantive law in the modern sense. The formal "law" of trespass and trespass on the case, the old forms of action we see as forerunners of the modern common law of torts, was really law about what had to be pleaded to get past the courts at Westminster and get out to a virtually unreviewable trial before a jury in the county. Pleadings in trespass were ritualized: the plaintiff ordinarily began with a stylized formula that touched only briefly the real facts in the case. The defendant's ordinary response was to plead the general issue, which denied generally the facts pleaded and also, according to Milsom, denied that defendant had acted wrongfully. Pleading the general issue sent the case to the jury, which determined the facts and also decided whether, on those facts, defendant had wronged the plaintiff. In case, the plaintiff had to set out the facts supporting his claim of wrong in a more detailed and less stylized way, but the defendant's ordinary response to an action brought in case was to plead the general issue and have the jury adjudicate the facts and the claim of wrong. In the early days of the common law there was no way to bring back to the central courts at Westminster for review the jury's determination of the facts and its judgment on the plaintiff's claim of wrong.

Under this law of pleadings, little substantive law was generated on issues that were ordinarily left to the unreviewed decisions of juries. In particular, the courts developed no law on issues of factual causation, the extent and recoverability of damages, and the wrongfulness of defendant's conduct in light of all relevant facts and circumstances in specific cases. So there was, of course, no substantive law of proximate cause.

The common law began to develop into a substantive legal system with

36. S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981). The analysis in the following three paragraphs repeats and extends the ideas in this great book by Milsom, at 42-59, 283-313, 392-400.

the rise of procedures in the sixteenth and seventeenth centuries for bringing back to the central courts at Westminster the verdicts of juries, together with all the facts revealed at trial. At first, the questions that came back were mostly pleading questions of the following form: "Given the actual facts in this case, did the plaintiff plead his case under the appropriate form of action?" The boundary lines between the pleading forms of actions were thus, for a time, of critical importance to lawyers. Once the judges got used to looking at all the facts of individual cases, however, they became impatient with the limitations imposed by the forms of action, and eventually began to develop a substantive law that was not hobbled by technical pleading categories. This movement toward a modern substantive law was encouraged by Blackstone's generalized view of the law in his influential Commentaries[37] and by the substantive treatise writers,[38] beginning with William Jones on Bailments[39] and culminating in the massive treatises produced at the end of the nineteenth and the beginning of the twentieth centuries.[40] The common law during the course of the nineteenth century moved from a law primarily about pleadings to a law primarily about substantive rules.

Milsom's explanation of the common law's development thus seems to explain why modern proximate cause notions do not show up in the cases until the nineteenth century. A careful analysis of the famous 1773 squib case—*Scott v. Shepherd*[41]—confirms this explanation of the late rise of proximate cause doctrine.

Shepherd, a mischievous child, threw a lighted squib, filled with gunpowder, into a partially enclosed market-house. The squib fell on the stand of a seller in the market, who picked it up and threw it across the market-house. It fell on the stand of another seller, who picked it up and threw it, too. On this throw, the squib hit Scott in the face and exploded, putting out his eye. To our eyes, the facts of *Scott v. Shepherd* raise a classic proximate cause question. But that was not the question before

37. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765). *See generally* S. MILSOM, THE NATURE OF BLACKSTONE'S ACHIEVEMENT, STUDIES IN THE HISTORY OF THE COMMON LAW 197-208 (1985).

38. On the importance of treatise writers in the latter half of the nineteenth century, see S. MILSOM, *supra* note 37; Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 651-68 (1981).

39. W. JONES, AN ESSAY ON THE LAW OF BAILMENTS (1781).

40. *See, e.g.*, J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904); S. WILLISTON, THE LAW OF CONTRACTS (1921).

41. 2 Black, W. 892, 96 Eng. Rep. 525 (K.B.).

the Court of King's Bench. Scott had pleaded in trespass and assault, conveniently leaving out the circuitous path to his injury: He alleged that defendant Shepherd had cast and tossed a lighted squib at him, striking him with it on the face, and burning one of his eyes so that he lost the sight of it. The jury found for the plaintiff, subject to the opinion of the court. The defendant argued that there was a fatal variance between the pleaded direct harm and the proven circuitously-caused harm, in that the facts at trial could not support a trespass action. The court treated this question as a boundary-line question: whether, on the facts proven at trial, the proper form of action was trespass, as plaintiff had pleaded, or case. The case falls squarely, then, in that transition period between a common law of pleading and a substantive common law.

The immediate result of *Scott* was to draw the line between trespass and case so that direct or immediate causation is required for trespass and indirect or consequential causation supports an action in case. Justice Blackstone in dissent insisted on this distinction and claimed that the causal relationship here was indirect and consequential.[42] Chief Justice DeGrey agreed with Blackstone that this was the test, but applied the test to the facts differently than Blackstone to find a direct causal relationship: "I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. *And I think that any innocent person removing the danger from himself is justifiable; the blame lights upon the first thrower*. . . . I do not consider [the intermediate throwers] as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation."[43] DeGrey's conclusion that Scott was the direct cause quite obviously derived from his judgment that Scott was the only blameable cause in the sequence of human action leading to plaintiff's injury. In applying the direct-consequential causation distinction, then, DeGrey smuggled in a judgment about the moral responsibility of the defendant Scott and the blamelessness of the intermediate actors.

Justice Nares, joined by Justice Gould, adopted a different view of the distinction between trespass and case. Nares focused on whether the defendant's action was wrongful in itself or only wrongful because of its consequences. Nares said, "[t]he principle I go upon is what is laid down

42. 2 Black, W. at 894-99, 96 Eng. Rep. at 526-28.

43. 2 Black, W. at 899-900, 96 Eng. Rep. at 529 (emphasis added).

in *Reynolds v. Clark*, Stra. 634, that if the act in the first instance be unlawful, trespass will lie."[44] Nares' distinction between acts unlawful in the first instance and those initially lawful, but wrongful in their consequences had a distinguished pedigree, tracing back through Lord Raymond to Chief Justice Holt.[45] Although stated in *causal* terms,[46] the test really harks back to the original distinction between trespass and case. Early on, the courts required that declarations in case had to set out the circumstances surrounding defendant's act to show why it was wrongful, whereas a simple description of the defendant's act itself was sufficient in trespass.[47] Nares' distinction, between acts wrongful in themselves and acts only wrongful in light of the surrounding circumstances, focuses directly on the traditional substantive distinction between trespass and case: the nature of the wrong in defendant's wrongful conduct. Ironically, Nares' focus on the old substantive distinction pointed forward toward the yet-to-emerge substantive law concerning wrongful conduct and tort liability more than did Blackstone's sterile causal formalism.

Nares' opinion in *Scott* pointed forward toward a substantive common law of torts in another and more immediate way. Nares was obviously impatient with boundary-line cases like *Scott v. Shepherd*, in which the losing party brought back to the courts at Westminster an alleged variation between the formulaic pleading and the facts brought out at trial to argue that the plaintiff had chosen the wrong form of action. Nares ended his opinion with this: "And it was declared by this court, in *Slater*

---

44. 2 Black, W. at 893, 96 Eng. Rep. at 526.

45. In *Reynolds v. Clark*, cited by Nares in *Scott v. Shepherd*, Lord Raymond held that only case would lie when a landowner lawfully entered plaintiff's adjoining property pursuant to an easement and attached spouts to his own house to collect rainwater to be discharged onto plaintiff's property, since "the act [of entering plaintiff's property and attaching spouts to his own] is prima facie lawful and the prejudice to another is not immediate, but consequential." Trespass is only proper, said Lord Raymond, when "the act in the first instance be unlawful." Lord Raymond relied on Lord Holt's decision in *Leveridge v. Hoskins*, in which Holt held that case would lie when defendant dug trenches on his own property, a lawful act in itself, but which as a consequence wrongfully drew water away from plaintiff's river.

46. Nares stated the distinction as that between acts unlawful in themselves and acts wrongful only because of their consequences. 2 Black, W. at 893-94, 96 Eng. Rep. at 526.

47. See the suggestion by S.F.C. Milsom:

> Examination of the writs [that were the forerunners of trespass and trespass on the case] will suggest that the real distinction was between acts which were obviously wrongful and those which were not; it was sensible to require a defendant to answer *quare clausum fregit* without more ado; but a writ asking why he had sold his own goods in his own house needed an introduction explaining that the plaintiff had a franchise of market and had lost his market dues.

Milsom, *Not Doing is No Trespass*, 1954 CAMBRIDGE L.J. 105, 106.

and Baker, . . . that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible."[48] Justice Blackstone responded with an acerbic defense of the old pleading regime, first distinguishing Nares' precedent on a procedural technicality[49] and then going on to quote Lord Raymond, speaking in the very case on which Nares had relied, to vindicate the importance of maintaining inviolate the forms of action.[50] Blackstone was defending a doomed system, however, and the future belonged to Nares and his vision of a common law freed from the distortions imposed by the rigid pleading categories.

C. History of Proximate Cause in Nineteenth Century Negligence Law

The modern law of negligence arose out of the wreckage of the old forms of action. Proximate cause doctrine is now a substantive part of modern negligence law, where it continues to play a significant role. To place the development of proximate cause doctrine in negligence law in proper context, then, we need to sketch in the early development of modern negligence law.

Negligence as a legal conceptual category was a late-blooming plant, the result of an historical process that culminated in the modern law of negligence in the early nineteenth century and was not really finished until around 1840. "Negligence" arose as a significant legal category in the early nineteenth century, as part of the recategorization of the common law from the old forms of action to the modern legal categories. In this recategorization, what was originally trespass on the case for negligence or default became modern negligence. The combined efforts of S.F.C. Milsom[51] and M.J. Prichard[52] have clarified the development of

48. 2 Black, W. at 894, 96 Eng. Rep. at 526.

49. *Slater and Baker* was first a motion for a new trial after verdict. In our case the verdict is suspended till the determination of the Court. And though after verdict the Court will not look with eagle's eyes to spy out a variance, yet, when the question is put by the jury upon such a variance, and it is made the very point of the cause, the Court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. . . .

2 Black, W. at 897, 96 Eng. Rep. at 527-28.

50. "It is said by Lord Raymond, and very justly in *Reynolds and Clarke*, 'we must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion.' " 2 Black, W. at 897, 96 Eng. Rep. at 528.

51. S. MILSOM, *supra* note 36.

52. M. PRICHARD, SCOTT V. SHEPHERD (1773) AND THE EMERGENCE OF THE TORT OF NEG-

the modern law of negligence. They identified two critical elements in the emergence of early negligence law: first, the ordinary reasonable man standard of conduct, applied by the jury, and, second, the technique of pleading a general duty of care.

Milsom argued that for centuries the jury had the ultimate say in determining whether a defendant's conduct was wrongful.[53] This was so because the defendant could deny plaintiff's claim of wrongfulness—a claim implicit in trespass and explicit in trespass on the case—by simply pleading the general issue, "not guilty."[54] The case would then be sent out to the county for the jury to decide. The jury's decision was effectively insulated from review by the court back at Westminster. In the eighteenth century, procedures developed that allowed the litigants to bring back the facts developed at the jury trial to the court at Westminster.[55] This threatened the jury's primacy in deciding whether defendant's conduct was wrongful. Further, it threatened to reduce the law of torts to a multitudinous set of very specific legal rules of conduct, as the courts at Westminster ruled as a matter of law on individual cases returned from the jury.

The ordinary reasonable man standard of conduct in negligence cases responded to both threats. The formal legal statement of the standard as the conduct of the ordinary reasonable man was pitched at a high level of generality. Adherence of the law to this level of generality could effectively keep the judges from reviewing jury verdicts on the facts developed at trial, for the judges did not need to decide as a matter of law whether certain conduct was negligent. All they needed to decide was whether the jury could reasonably find that the conduct was not that of the ordinary reasonable man. Thus, the development of the ordinary reasonable man standard blunted the threat that the eighteenth century development of procedures for reviewing jury verdicts would ultimately reduce the law of torts to a multifarious set of very specific legal rules of conduct. At the same time, it helped maintain the primacy of the jury in determining whether defendant's conduct was wrongful.[56]

LIGENCE (1976); Prichard, *Trespass, Case, and the Rule in* Williams v. Holland, 1964 CAMBRIDGE L. J. 234.

53. S. MILSOM, *supra* note 36, at 296-313.

54. *Id.*

55. *Id.* at 397; M. PRICHARD, *supra* note 52, at 14-15.

56. If the test that juries had always used to determine wrongfulness, without specific legal guidance, was whether defendant's conduct was contrary to accepted, established patterns for coordinating activity in a particular community, then the new legal standard, asking the jury whether

The second key element in the development of the negligence cause of action was the general duty of care pleading. Prichard[57] identifies the early common carrier cases of *Ansell v. Waterhouse*[58] in 1817 and *Bretherton v. Wood*[59] in 1821, as the key cases in developing the general duty of care pleading. In both cases, the judges seemed to understand the pleaded general duty as equivalent to a pleaded custom of the realm. Lord Ellenborough in *Ansell* characterized the general duty pleading as "tantamount" to pleading custom of the realm.[60] All the courts in the Exchequer Chamber accepted this reasoning in *Bretherton*, in which Chief Justice Dallas argued, "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely. . . ."[61] In the earliest duty of care cases, then, the judges recognized the general duty allegation as a way of declaring on the custom of the realm without pleading the specific custom.

Pleading a general duty was obviously safer for the plaintiff's attorney than attempting at his client's peril to plead the proper specific custom of the realm. Given its desirability to plaintiff attorneys, it is not surprising that the general duty allegation spread rapidly from the common carrier context to other negligence cases in the early nineteenth century. The judges who authorized this rapid spread may have seen a related advantage for the legal system as a whole, for the general duty of care allegation helped resolve a practical pleading problem in the common law.[62] The general duty allegation provided a broad umbrella category under

---

defendant acted as an *ordinary* reasonable man would have acted, seems to be an excellent method for retaining that test. Furthermore, that procedure and that standard provide a solution to the basic problem of extending tort liability to cases in which the defendant intended no contact with the plaintiff. It may have been impossible to reduce to legal rules the multifarious sets of mores and patterns of conduct in particular communities concerning coordination of conduct not intended to cause contact with others. By adopting the jury-applied standard of the ordinary reasonable man's conduct, the judges did not need to know the patterns or mores themselves in any detail; they did not need to risk adopting as the law of England a pattern prevalent only in one geographical area; and they did not run the risk of stating the pattern of expected conduct too broadly in a formal rule that might include other situations governed by different expectations, based on different social rules.

57. *See* M. PRICHARD, *supra* note 52, at 28.

58. (1817) 6 M & S 385, 105 Eng. Rep. 1286.

59. (1821) 3 Brod. Bing. 54, 129 Eng. Rep. 1203.

60. 6 M. & S. at 388-90, 105 Eng. Rep. at 1288.

61. (1821) 3 Brod. & Bing. at 62, 129 Eng. Rep. at 1206.

62. For a fuller analysis of these questions, *see* Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, forthcoming in Cleveland State Law Journal, at Section IIIB.

which all kinds of specific facts could be pleaded. Recognition of this broad category avoided the multiple categories that would have developed if customs of the realm had to be pleaded specifically under the new procedural conditions that encouraged accurate fact pleading. With this broad umbrella category, the courts avoided getting bogged down in the minutiae of specifically pleaded customs, with the attendant risk of transferring from the jury to the courts the responsibility for determining the standard of behavior. The general duty pleading, then, like the ordinary reasonable man standard, helped maintain the jury's historic role in determining whether a defendant's conduct was wrongful.

The proximate cause limitation on negligence liability seems to run counter to the jury-preserving thrust of the two early-established elements in the emerging law of negligence, for proximate cause questions are and were often decided as matters of law by the courts.[63] One wonders when and why this seemingly incongruous element entered the law of negligence.

The answer to the question "when" depends on what one is seeking. If one is looking for a single case applying recognizable proximate cause reasoning in a claim that we would now see as one sounding in negligence, the answer is easy: 1810 and the case of *Flower v. Adam*.[64] If one is looking for evidence of a consistently applied and internally understood doctrine, the answer is more difficult. The earliest date would then seem to be in the 1840s, well after Chief Justice Tindal of the Court of Common Pleas nailed down the two principal elements of the modern substantive law of negligence in the 1820s and 1830s.

A careful look at *Flower v. Adam* shows why it is so intriguing to us, in retrospect, and why it is of so little importance in the development of proximate cause doctrine in negligence law. In *Flower v. Adam*[65] the

63. *See, e.g.*, Tisdale v. Inhabitants of Norton, 49 Mass. (8 Metc.) 388 (1844); Marble v. City of Worcester, 70 Mass. (4 Gray) 395, (1855); Sharp v. Powell, L.R. 7 C.P. 253 (1872); Glover v. The London and Southwestern Ry Co, 3 L.R.Q.B. 25 (1867). See the acerbic comment of Nicholas St. John Green:

> Confusion has resulted from regarding [Bacon's proximate cause maxim], not as a general caution, but as a precept susceptible of special application. . . . Some American courts seem to have regarded it as particularly applicable to cases of negligence, and in actions of that description have looked upon it as a rule placed in their hands for the purpose of measuring the facts, and saving the jury from trouble.

Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201, 210 (1870), *reprinted in* 9 RUTGERS L. REV. 452, 459.

64. [1810] 2 Taunt. 313, 127 Eng. Rep. 1098 (C.P.).

65. *Id.*

legal question was not a pleading question at all. Plaintiff had brought his action in case, defendant had obtained a jury verdict, and the question before the Court of Common Pleas was whether, on the facts developed at trial, Chief Justice Mansfield had properly instructed the jury. We are thus, with *Flower*, squarely in the realm of the developing substantive law. And the facts raised what is to our eyes, at least, clearly a proximate cause question. A bricklayer employed by the defendant dumped fourteen barrows of lime rubbish in a heap in front of defendant's door in the street. The wind blew up a whirlwind of dust from the heap, which frightened plaintiff's usually quiet horse while plaintiff was driving by in a single horse chaise. The horse started to the other side of the road, heading for a wagon coming from the other direction, and plaintiff pulled the horse back into his lane so violently that it ran over a second rubbish heap lying in the street before another man's door, which broke the shaft to the chaise. This second shock alarmed the horse even more. It ran away, the chaise was overturned, and plaintiff was thrown out and hurt. Chief Justice Mansfield instructed the jury that "if the mishap was occasioned either by pure accident, or owing to the Plaintiff not being a very skillful charioteer, the Plaintiff was not entitled to recover: if the placing of the lime rubbish before the door was no more than a person would do in the usual course of business, it might be considered as a mere accident; if there was blameable negligence, they would find for the Plaintiff."[66]

In arguing before the full Court of Common Pleas that Chief Justice Mansfield's direction was error, the plaintiff's attorney urged that if placing rubbish in the highway was blameful, the fact that plaintiff reacted unskillfully to his horse's shying should not be a defense, for the law protects all equally from wrongs—the unskillful as well as the skillful.[67] Furthermore, he argued, it was error to allow the jury to find that placing rubbish in the road, a criminal nuisance, was a matter of accident.[68] Chief Justice Mansfield, reviewing his actions as the trial judge, supported his jury instruction by simply restating it in different form, without responding directly to plaintiff's two arguments. He said, "[I]s not this too remote to affect the Defendant in this action? Here is a heap of rubbish: the dust rises from it; the horse runs towards a wagon, and the driver, . . . without the necessity of turning his horse so violently as he

66. 2 Taunt. at 316, 127 Eng. Rep. at 1099.
67. *Id.*
68. 2 Taunt. at 317, 127 Eng. Rep. at 1100.

did, pulls him that way. I rather think it is either accident or inability in the driver."[69] Justice Heath was absent that day, and the only other comment was by Justice Lawrence, who said only that "[t]he immediate and proximate cause is the unskillfulness of the driver."[70]

Both Mansfield's "remoteness" language and Lawrence's identification of the plaintiff's lack of skill as the proximate cause seem aimed at identifying the responsible human agency. Is there any way, on these facts, to support the use of causal terms in explaining why the driver himself is responsible for the harm? The key, I think, lies in an understanding of the court's implicit response to plaintiff's argument on the accident issue. Plaintiff argued that dumping rubbish in the road is a criminal nuisance and therefore necessarily blameable, so the resultant harm could not be an "accident," when no human agency is to blame. Plaintiff's unskillful reaction to a condition caused by defendant's wrongful conduct, therefore, could not be the responsible cause. Mansfield's insistence in the face of these arguments that this could be deemed either an accident or solely attributable to plaintiff's unskillfulness only makes sense if we fill in the blanks in his argument, as follows:

> Dumping debris in the road is a public nuisance because it obstructs travel, not because it gives rise to dust that may spook a horse. A wind-whipped dust whirlwind could have spooked plaintiff's horse if the lime rubbish heap had been by the side of the road, and hence not a public nuisance. Moreover, any number of things may give rise to a whirlwind of dust, and drivers of horses ought to be ready and able to control their horses in the face of such an everyday, ordinary condition. Therefore, this is either just an accident, or properly chargeable to plaintiff's inability to control his horse.

This reasoning makes sense out of both the causation language and the responsibility-ascribing language in the opinions by Lawrence and Mansfield. The key to the causation conclusion is that the dust whirlwind could have occurred even if defendant had acted properly. To take the causation argument out of that context and look solely to the causal sequence here risks distortion; the case could very well have come out differently if plaintiff's horse had initially veered into the path of the oncoming wagon because the chaise had *hit* the rubbish heap dumped by defendant's agent in the road.

To us, then, *Flower v. Adam* is a wonderfully evocative proximate

69. *Id.*
70. *Id.*

cause case, but in its time it sank like a stone without a trace, to be resurrected as a substantive proximate cause precedent only in the 1850s and 1860s[71] when proximate cause became recognized as a full-fledged substantive doctrine in negligence law. Why was the *Flower* holding not recognized immediately as elaborating an important substantive law principle? Perhaps, because it did not fit in any substantive law context. *Flower* preceded the earliest development of the substantive law of negligence, and it was formally based on the notion of inevitable accident, which had traditionally been left to juries with instructions by judges that were not thought to be part of the "law" at all. Until the courts recognized that their rulings in reviewing jury instructions were creating substantive common law, and realized cases like *Flower* were potentially important cases for legal principle, they may not have given the kind of weight to those cases that they gave to the cases like *Scott v. Shepherd*, which dealt with *real* (i.e., pleading) law.

Looking back on the period between 1810 and 1840, later courts and commentators dealing with proximate cause in negligence law claimed two other cases as substantive proximate cause precedents:[72] *Guille v. Swan*,[73] an 1822 New York case, and *Illidge v. Goodwin*,[74] a report of a trial in the Court of Common Pleas before the estimable Chief Justice Tindal. Neither case, however, shows evidence of a consistently applied and internally understood substantive doctrine of proximate cause. In *Guille*, a hot-air balloonist was airborne for a while, but then crashed into plaintiff's garden. The crash itself caused minimum damage but a crowd of would-be rescuers and curiosity seekers caused significantly greater damage in trampling plaintiff's garden to get to the downed defendant. The court held that the balloonist could be held liable in trespass for the harm caused by the trampling crowd, applying the *Scott v. Shepherd* test of direct consequences. The court concluded that the crowd of would-be rescuers and curiosity seekers were joint trespassers with the balloonist defendant because their actions were the ordinary and natural reaction to defendant's situation.[75]

71. *See, e.g.*, Harrison v. Berkley, 1 Strob. 525 at 538, 47 Am. Dec. 578, 581; Marble v. City of Worcester, 4 Gray 395, 401 (Mass. 1855).

72. *E.g.*, Vandenburgh v. Truax, 4 Denio 464 (N.Y.1847) (citing Guille v. Swan, 19 Johns. 381 (N.Y. 1822)). *E.g.*, Marble v. City of Worcester, 70 Mass. (4 Gray) 395, 405 (1855) (citing Illidge v. Goodwin).

73. 19 Johns. 381 (N.Y. 1822).

74. [1831] 5 Car. & P. 190, 172 Eng. Rep. 934 (C.P.).

75. 19 Johns. at 383.

In *Illidge v. Goodwin*, plaintiff shopkeeper sued defendant for harm caused when defendant's cart and horse backed into his shop window. When defendant tried to defend by testimony of two witnesses who swore that a passer-by had struck the horse, "the jury interposed, and said they did not believe the evidence of either of them."[76] Chief Justice Tindal stepped in and commented, "After all, supposing them to be speaking the truth, it does not amount to a defense. If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done."[77] Neither Tindal's terse comments to the jury in *Illidge* nor the technical holding on the joint trespasser issue by the New York court in *Guille* evidences any understanding that they were applying a proximate cause doctrine.

It was only in the 1840s, when a more coherent idea of a substantive law of negligent torts had developed, that proximate cause became firmly established as an element in negligence law. Starting with *Lynch v. Nurdin*[78] in England and proceeding through *Vandenburgh v. Truax*[79] in New York, *Harrison v. Berkley*[80] in South Carolina, and *Powell v. Deveney*[81] in Massachusetts, proximate cause gained a toehold in the emerging negligence law.

The courts in these early proximate cause cases did not adopt a uniform test of proximate cause. In *Lynch v. Nurdin*,[82] the English Court of Queen's Bench held that one who negligently left a horse cart unattended for a lengthy period in an area where children were known to play would be liable for harm to the boy plaintiff who fell off the cart and was injured when another boy started up the horse. The court reasoned:

> [I]f I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.[83]

In *Vandenburgh v. Truax*,[84] a New York court held that a man who

76. 5 C & P 381 at 192, 172 Eng. Rep. 934 at 935 [1831, C.P.]
77. *Id.*
78. 113 Eng. Rep. 1041 (Q.B. 1841).
79. 4 Denio 464 (N.Y. 1847).
80. 32 S.C.L. (1 Strob.) 525 (S.C. 1847).
81. 57 Mass. (3 Cush.) 300 (1849).
82. 113 Eng. Rep. 1041 (Q.B. 1841).
83. 113 Eng. Rep. at 1043.
84. 4 Denio 464 (N.Y. 1847).

quarreled with a boy in the street and then angrily chased after him with a pick ax was liable in trespass for harm caused when the terrified boy ran into plaintiff's shop to escape and knocked the faucet from a cask of wine. The court, comparing this case with *Scott v. Shepherd*, reasoned that even though "[t]he injury [to plaintiff] was not the necessary consequence of the wrong done by the defendant . . . [nevertheless] . . . the wrong was of such a nature that it might very naturally result in an injury to some third person."[85]

In *Harrison v. Berkley*,[86] the South Carolina court dealt with the proximate cause question in an influential case whose facts are, to us, repellant because they invoke details of the institution of slavery. Defendant sold liquor to a slave in violation of a statute forbidding sale of liquor to slaves. The slave was subsequently found in the road, dead of exposure, and the slave owner sued. The court upheld a verdict for the plaintiff slave owner over the objection that the intervening acts of the slave in drinking and passing out in the road on a cold night made defendant's wrongful conduct too remote to support liability. The court reasoned as follows:

> Only the proximate consequence shall be answered for. The difficulty is to determine what shall come within this designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of those would be pronounced to be, would often depend upon the power of the microscope, with which we should regard the affair. Various cases show that in search of the proximate consequences the chain has been followed for a considerable distance, but not without limit, or to a remote point. Such nearness in the order of events, and closeness in relation of cause and effect, must subsist, that the influence of the injurious act, may predominate over that of other causes, and shall concur to produce the consequence, or may be traced in those causes. To a sound judgment must be left each particular case. The connextion is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence, than the first injurious act. It is, therefore, required that the consequences to be answered for, should be natural as well as proximate. By this, I understand, not that they should be such, as upon a calculation of chances, would be found likely to occur, nor such as extreme prudence might anticipate, but

85. 4 Denio at 467.

86. 32 S.C.L. (1 Strob.) 525 (S.C. 1847).

> only, that they should be such, as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural to constitute legal damage, it seems that in proportion as one quality is strong, may the other be dispensed with: that which is immediate, cannot be considered unnatural; that which is reasonably to be expected, will be regarded, although it may be considerably removed.[87]

The South Carolina court's lengthy, carefully qualified statement of the proximate cause doctrine was greatly admired and often quoted[88] in the following decades. The test was stated in such general terms, however, and was so carefully qualified that it seems altogether useless as a guide to decision. And one might well question the usefulness or accuracy of a doctrine that cannot be stated adequately in less than 250 words. Proximate cause was in deep trouble from the start.

We should note two additional facts about the timing of proximate cause's emergence as a substantive doctrine in negligence law. First, the proximate cause doctrine developed earlier in three other areas of the law than in the emerging law of negligence. Those three areas were: (a) the developing substantive law of damages, in particular the requirements for establishing *special* damages[89] and the broadly generalized principle that remote damages could not be recovered;[90] (b) the law of maritime insurance, in which the courts resolved coverage questions by asking whether the peril insured against was the proximate cause of the loss;[91] and (c)

---

87. 32 S.C.L. (1 Strob.) at 548-49 (citations omitted).

88. *See, e.g.*, T. COOLEY, A TREATISE ON THE LAW OF TORTS 74, n.2 (1880); 2 S. THOMPSON, THE LAW OF NEGLIGENCE 1083-84 (1880).

89. Addison in his 1860 Treatise on Torts, cites for the general proximate cause rule a series of English cases dealing with the recovery of special damages in libel and slander actions. C. ADDISION, WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS 4-5 (3d ed. 1869) (citing Gerhard v. Bates, 2 E & B 490, 118 Eng. Rep. 845 (K.B. 1853); Vicars v. Wilcox, 8 East 1, 103 Eng. Rep. 244 (K.B. 1806); Ashley v. Harrison, 1 Esp. 49, 170 Eng. Rep. 276 (1793); Ward v. Weeks, 7 Bing. 209, 131 Eng. Rep. 81 (C.P. 1830)).

90. Both T. SEDGWICK, MEASURE OF DAMAGES (1847) and J. MAYNE, TREATISE ON THE LAW OF DAMAGES 36-40 (1856) recognized as a general principle of the law of damages that only proximate consequential damages could be recovered, and not remote consequential damages.

91. For a sensitive and scholarly review of the long history of proximate cause as a test of whether particular damages are covered under a maritime insurance policy, see Justice Story's brilliant opinion in Peters v. The Warren Insurance Co., 39 U.S. (14 How.) 99, 107-13 (1840). Chief Justice Shaw in Marble v. Worcester, 70 Mass. (4 Gray) 395, 398-400 (1855) relied heavily on maritime insurance cases, over the objections and corrective citation of Story in the *Peters* case by Justice Thomas in dissent, 70 Mass. (4 Gray) 395 at 409, 411. For a subsequent, poorly reasoned maritime

the limitation on recovery for consequential damages in contract.[92] The courts borrowed heavily from these three areas in applying proximate cause limitations in negligence actions.

Second, about the same time as proximate cause developed as a limitation on liability in actions on the case for negligence in the 1840s, three other significant limitations developed: privity of contract as a limitation on liability in an action on the case for negligence,[93] contributory negligence as a limitation on negligence liability,[94] and the statutory purpose limitation on negligence liability for breach of a statutory duty.[95] In the early privity[96] and contributory negligences[97] cases, courts used proximate cause language to explain the limiting rule. The statutory purpose limitation was in an early stage in the 1840s and 1850s. It developed into the now-familiar hazard/class test much later. Three significant early cases that would have been analyzed as statutory negligence cases under the later-developed hazard/class limitation on recovery in negligence for harm caused by breach of statutory duty were decided solely on proximate cause grounds.[98] And modern statutory negligence cases often use

---

insurance coverage case involving the proximate cause test, which nevertheless had some influence on subsequent proximate cause negligence cases, see Insurance Co. v. Tweed 74 U.S. (7 Wall.) 44 (1868). See also the commentary on proximate cause in maritime insurance coverage cases in Nicholas St. John Green, 4 AM. L. REV. 201, 214-15 (1870), *reprinted* 9 RUTGERS L. REV. 452, 462-63.

92. *See, e.g.*, T. PARSON, THE LAW OF CONTRACTS (1853) (section 5 of chapter 8 discusses remote consequential damages not recoverable in contract action).

93. *See* Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842); Longmeid v. Holliday, 155 Eng. Rep. 752 (Ex. 1851).

94. Wex Malone traced a rapid increase in American contributory negligence cases to the middle of the nineteenth century: "In America the idea of contributory negligence lay virtually dormant until about the middle of the last century; then suddenly it sprang to life and found its way into virtually every piece of litigation over a negligent injury to person or property." Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. Rev. 151 (1946).

95. *See, e.g.*, Couch v. Steel, 3 El. & Bl. 402 (Q.B.); 23 L.J. [Q.B.] 121 (1854); Stevens v. Jeacocke, 11 Q.B. 731, 116 Eng. Rep. 647 (1848).

96. Winterbottom v. Wright, 10 M & W (Exch. 1842) 107, 152 Eng. Rep. 402; Dale v. Grant, 34 N.J. 142 (1870); Kahl v. Love, 37 N.J. 5 (1873); Burrows v. The March Gas & Coke Co., L.R., 5 Exch. 67 (1870), *affirmed* L.R., 7 Exch. 96 (1870).

97. Butterfield v. Forrester, 11 East 59, 103 Eng. Rep. 926 (E. 1809) (pre-cursor case); Davies v. Mann, 152 Eng. Rep. 588 (Ex. 1842); POLLOCK, LAW OF TORTS 474 (13th ed. 1929).

98. Tisdale v. Inhabitants of Norton, 49 Mass. (8 Metc.) 388 (1844) (breach of statute requiring city to keep streets in good repair); Marble v. City of Worcester, 70 Mass. (4 Gray) 395 (1855) (same); Harrison v. Berkley, 1 Strob. 525 (S.C. 1847) (breach of statute prohibiting sale of liquor to a slave).

proximate cause language.[99]

The trickle of recognizable proximate cause cases in the 1840s became a stream in the 1850s, and a flood in the 1860s and 1870s. Part of the reason for the rapid acceptance of proximate cause doctrine may be the concomitant appearance of substantive treatises on torts and on negligence in the 1860s and 1870s. Beginning with the first torts treatises in 1859[100] and 1860,[101] a host of eager treatise writers on torts and negligence solidified,[102] refined, and variously explained the new-born substantive doctrine of proximate cause in negligence cases. Thereafter, the development of proximate cause rules in the case law was influenced by the flowering of substantive proximate cause doctrine in the treatises.

The first major torts treatise, in 1860,[103] recognized proximate cause as a limitation on all liability in tort. Citing primarily to special damage cases under the old pleading rules, Addison stated the negative rule in broad, general terms:

> If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damages are not sufficiently conjoined or "concatenated as cause and effect to support the action."[104]

---

99. *See, e.g.*, Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197 (1926); Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

100. 1 F. HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 94-98 (1st ed. 1859) (proximate cause discussed inadequately).

101. C. ADDISON, WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS 4-5 (1860) (Proximate cause discussed).

102. The following American authors published treatises on torts between 1859 and 1900: Francis Hilliard (1st ed. 1859, at least three subsequent editions), Francis Wharton (1st ed. 1874, 2d ed. 1878), Thomas Cooley (1st ed. 1880, 2d ed. 1888), and Melville Madison Bigelow (1st ed. 1878, at least 5 subsequent editions; cases plus commentary published in 1878).

The following British authors published treatises on torts between 1860 and 1900: Charles Greenstreet Addison (1st ed. 1860, at least five subsequent English editions and several American editions), Frederick Pollack (1st ed. 1887 four more editions before 1900), and Arthur Underhill (1st ed. 1881, several English and American editions before 1900).

The following British authors published treatises on negligence between 1860 and 1900: Thomas Saunders (1st ed 1886) and Horace Smith (both British and American editions).

The following American authors published treatises on negligence between 1860 and 1900: James Deering (1st ed. 1886 and subsequent editions), Seymour Dwight Thompson (1st ed. 1880). Francis Wharton (1st ed. 1874, 2d ed. 1878), and Thomas Shearman and Amasa Redfield (1st ed. 1869 and four editions through 1898).

See generally B. TAYLOR & R. MUNRO, AMERICAN LAW PUBLISHING 1860-1900 (1984) (Subject Index Vol. 407-408, 531-33).

103. C. ADDISON, *supra* note 101.

104. *Id.* at 4.

Addison cited to *Scott v. Shepherd*, *Vandenburgh v. Truax*, and *Lynch v. Nurdin* in support of the converse positive rule:

> [W]hoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided their acts, causing the damage, were the necessary or legal and natural consequences of the original act.[105]

All the subsequent treatises on torts in general or on negligence in particular accepted the proximate cause limitation on negligence liability.[106] While the treatise writers were unanimous in recognizing the proximate cause limitation on negligence liability, they presented a diverse set of justifications for the rule. Judge Cooley said the reason for the rule was the difficulty of proving remote causal relationships.[107] Seymour Thompson adopted the explanation of the Pennsylvania court in *Fleming v. Beck* [108] that the reason for the rule was to avoid crushing and unjust liability for *all* the consequences of a single wrongful act.[109] Francis Wharton saw the rule as a means of searching for the blameable human agent responsible for the wrong to the plaintiff.[110] Frederick Pollock saw that the proximate cause limitation in negligence cases, precluded liability for harm a reasonable person in defendant's position would not have foreseen.[111] This, he thought, simply applies the basic test of wrongfulness underlying the negligence tort: breach of a general duty to avoid conduct posing a foreseeable risk of harm to others.[112]

Wharton and Pollock disagreed about the proper statement of the proximate cause test. Wharton argued that the test should be the ordi-

---

105. *Id.* at 5.

106. The treatise writers did not share Justice Thomas's doubts, expressed in his 1855 dissent in Marble v. Worcester, 70 Mass. (4 Gray) 395 (1855) whether the proximate cause doctrine belonged in the substantive law of torts at all.

107. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety.

T. COOLEY, *supra* note 88, at 69. It is difficult to reconcile Cooley's rationale, which suggests a causal sequence model, with his rejection of that as the test of proximate cause.

108. 48 PA. 309, 313 (1864).

109. 2 S. THOMPSON, *supra* note 88, at 1084.

110. F. WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 73-84 (2d ed. 1878).

111. F. POLLOCK, *supra* note 33, at 21-45.

112. *Id.*

nary, natural sequence test.[113] Wharton firmly rejected the foreseeable consequences test.[114] Pollock attacked Wharton's reasoning and asserted that the only proper test was that of foreseeable consequences.[115]

Both Pollock and Wharton could plausibly claim support from the decided cases. Almost all the courts announced a general test of proximate cause that embodied the notions of natural, ordinary consequences of defendant's wrongful conduct.[116] With the benefit of hindsight, and at the risk of distinguishing things that were not necessarily understood as separate at the time, we can go beyond the apparent unanimity to identify two potentially divergent approaches in the early proximate cause cases. One approach was to focus on the sequence of events leading to plaintiff's injury and look for principles that will tell us whether defendant's conduct was the proximate cause of plaintiff's harm by looking both at the place of defendant's conduct in that sequence and the nature of the events intervening between defendant's conduct and plaintiff's harm.[117] This approach found its fullest expression in the influential case of *Milwaukee and St. Paul Railway Company v. Kellogg*,[118] decided by the United States Supreme Court in 1876:

> The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.[119]

---

113. F. WHARTON, *supra* note 110, at 3, 85 *et. seq.*

114. *Id.* at 62-67.

115. F. POLLOCK, *supra* note 33, at 30-33.

116. *See, e.g.*, Harrison v. Berkley, 32 S.C.L. (1 Strob.) 525, 549 (1847); Morrison v. Davis, 20 Pa. 171, 175 (1852); Vandenburgh v. Truax, 4 Denio 464, 465-66 (N.Y. 1847).

117. *See, e.g.*, Vandenburgh v. Truax, 4 Denio 464 (N.Y. 1847); Baltimore & P. R.R. v. Reaney, 42 Md. 117 (1875); Cuff v. Newark & N.Y. R.R., 35 N.J.L. 17 (1870).

118. 94 U.S. 469 (1876).

119. *Id.* at 475.

This emphasis on the nature of the causal sequence no doubt seemed only natural to judges who looked back into the depths of the common law for substantive proximate cause precedents and, not knowing there were none, dredged up *Scott v. Shepherd*. It didn't make much sense, of course, to determine whether plaintiff could recover in negligence by comparing the events intervening between the defendant's conduct and the plaintiff's harm in the case for decision with the intervening events in *Scott v. Shepherd* because all that was at issue in *Scott* was the proper form of liability, not ultimate liability. Nevertheless, the canonization of *Scott v. Shepherd* as a proximate cause precedent was generally accepted, and it no doubt contributed in cases like *Vandenburgh v. Truax* and others to the courts' focus on the causal sequence. This tendency may have been encouraged, as well, by the seemingly obvious meaning of the term "proximate," which conjured up to minds untutored in medieval scholastic philosophy the notion of nearness or proximity, and the corresponding mental image of a sequence of causes.

A different approach was taken by other judges who emphasized the expected, foreseeable consequences of defendant's conduct as the test of proximate causation.[120] A number of courts used this foreseeability test in conjunction with an analysis of the causal sequence, without recognizing that the two approaches differed.[121] Early on, however, two English judges urged a simple foreseeable consequences test of proximate cause, not conjoined with any other test. Chief Baron Pollock of the Court of Exchequer was the first to announce the proposed test in two cases decided by the Court of Exchequer on the same day in 1850. *Rigby v. Hewitt*[122] raised the question of imputing contributory negligence from a common carrier to a passenger. *Greenland v. Chaplin*[123] involved recovery for what we would now call "second collision" injuries when defendant's negligently piloted steamboat collided with another steamboat carrying plaintiff as a passenger. The collision in turn dislodged an anchor stowed on the steamboat's bow, which fell and injured the plaintiff passenger. The Court of Exchequer affirmed jury verdicts for the

120. *See, e.g.*, Sharp v. Powell, L.R. 7 C.P. 253 (1872); Fairbanks v. Kerr, 70 Pa. 86 (1871); McGrew v. Stone, 53 Pa. 436 (1866); Scott v. Hunter, 46 Pa. 192 (1863); Morrison v. Davis, 20 Pa. 171 (1852); Harrison v. Berkley, 32 S.C.L. (1 Strob.) 525 (S.C. 1847). The Pennsylvania court, in the series of cases cited, consistently employed a sophisticated foreseeable consequences test.

121. *See. e.g.*, Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U.S. 469 (1876); Morrison v. Davis, 20 Pa. 171 (1852); Harrison v. Berkley, 32 S.C.L. (1 Strob.) 525 (S.C. 1847).

122. [1850] 5 Ex. 240, 155 Eng. Rep. 103 (Ex.).

123. [1850] 5 Ex. 243, 155 Eng. Rep. 104 (Ex.).

plaintiffs in both *Rigby* and *Greenland*. Pollock, speaking only for himself, added cautionary dicta in both cases about recovery for consequential damages, which he took to be limited to the reasonably foreseeable consequences of defendant's conduct.[124]

In 1870, Justice Brett of the Court of Common Pleas dissented in the case of *Smith v. The London and Southwestern Railway Company*[125] on the grounds that defendant should not be liable in negligence for harmful consequences of his acts that no reasonable man could have foreseen. The issue was squarely joined in the Court of Exchequer Chamber, which reviewed the decision by the Court of Common Pleas.[126] The question was not resolved definitively, however, as some judges upheld the Common Pleas' decision on the grounds that this kind of harm to plaintiff was foreseeable.[127] Other judges thought that foreseeable harm was only relevant to the determination of negligence, and was not thereafter relevant to the proximate cause question,[128] which they seemingly determined by a test of natural consequences of defendant's negligent conduct.

Why did the judges, early on, use a foreseeable consequences test for

---

124. In *Rigby*, he stated:

> On the present occasion I entirely concur with the Court that there ought to be no rule, and that the direction was perfectly right. I am, however, disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct. . . .

5 Ex. at 243, 155 Eng. Rep. at 104.

In *Greenland*, Pollock stated:

> But here I may again state, that it occurs to me there is considerable doubt,—and at present I guard myself against being supposed to decide with reference to any case which may hereafter arise; but, at the same time, I am desirous that it may be understood that I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur.

5 Ex. at 248, 155 Eng. Rep. at 106.

125. 5 L.R.-C.P. 98 (1870).

126. 6 L.R.-C.P. 14 (Ex. 1870).

127. Pigott, B. in the Exchequer Chamber (and Bovill, J. and Keating, J. in Common Pleas).

128. Kelly, C.B., Channell, B., & Blackburn, J., in Exchequer Chamber. Bramwell, B., Martin, B., and Lush, J. were noncommittal on this issue.

proximate cause? No definitive answer can be given, although three factors, alone or in combination, may have something to do with it. The foreseeable consequences test of proximate causation may have seemed natural to judges who were used to applying a test of consequences foreseeable or contemplated at the time of contracting in determining whether consequential damages were recoverable for breach of contract, and a similar test of foreseeable and anticipatable consequences from specifically insured perils in maritime insurance coverage cases. Or, perhaps the positivist notion that, by experiencing recurrent patterns of successive phenomena, we discover scientific laws of causation, which, in turn, give us an ability to predict and foresee the consequences of our action, may have had an influence on widely-read judges like Pollock and Brett. Or "foreseeability" may just have seemed an accurate and illuminating way of expressing the delicate judgments about the mutual expectations in social systems of reliance that underly some of our basic judgments about wrongdoing in any particular social context.

Each of these two approaches to proximate cause questions was attacked vigorously in the 1870s. In 1870, Nicholas St. John Green attacked the causal sequence approach to proximate cause issues in an article published in the American Law Review.[129] Green first attacked the simple-minded "proximity" interpretation of the term proximate cause by sketching the causal potency meaning of proximate cause in medieval scholastic philosophy. He did not urge a return to the scholastic understanding of causation, however, but proposed a wholly modern approach. Green argued that the phrase "chain of causation" embodied a dangerous metaphor:

> It raises in the mind an idea of one determinate cause, followed by another determinate cause, created by the first, and that followed by a third, created by the second, and so on, one succeeding another till the effect is reached. The causes are pictured as following one upon the other in time, as the links of a chain follow one upon the other in space. There is nothing in nature which corresponds to this. Such an idea is a pure fabrication of the mind.
>
> There is but one view of causation which can be of practical service. To every event there are certain antecedents, never a single antecedent, but always a set of antecedents, which being given the effect is sure to follow, unless some new thing intervenes to frustrate such result. It is not any one of this set of antecedents taken by itself which is the cause. No one by itself

129. Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870), *reprinted in* 9 RUTGERS L. REV. 452 (1954).

> would produce the effect. The true cause is the whole set of antecedents taken together. Sometimes also it becomes necessary to take into account, as a part of the set of antecedents, the fact that nothing intervened to prevent the antecedents from being followed by the effect. But when a cause is to be investigated for any practical purpose, the antecedent which is within the scope of that purpose is singled out and called the cause, to the neglect of the antecedents which are of no importance to the matter in hand. These last antecedents, if mentioned at all in the inquiry, are called conditions.[130]

The purpose of the proximate cause inquiry in the law differs depending on the context and the specific purpose of the inquiry. In actions of negligence, Green argued, "a defendant is held liable for the natural and probable consequences of his misconduct. In this class of actions his misconduct is called the proximate cause of those results which a prudent foresight might have avoided."[131]

Green's attack on the "metaphor" of causal sequence, his espousal of a modern scientific notion of causation as the set of all necessary conditions, his conclusion that the distinction between cause and condition was determined solely by the purpose of the inquiry, and his espousal of a foreseeability test of proximate cause, all evoked a vigorous response from Francis Wharton in his 1874 *Treatise on Negligence*. Wharton argued as follows:

> The necessitarian philosophers, who treat all the influences which lead to a particular result as of logically equal importance, and who deny the spontaneity of the human will, tell us that the cause is the sum of all the antecedents. . . . [Under this view, there are an almost infinite number of necessary antecedents to any given phenomenon.] Jurisprudence, however, does not concern itself with refinements such as these. Its object is to promote right and redress wrong; and without undertaking to propound any theory of the human will, it contents itself with announcing as a fact established by experience that by making a law that a human "antecedent" shall be punishable for a wrongful act, such "antecedent," if not restrained from committing the wrong, may be compelled to redress it. The question, therefore, when an injury is done, is, whether there is any responsible person who could, if he had chosen, have prevented it, but who either seeing the evil consequences, or negligently refusing to see them, has put into motion, either negligently or intentionally, a series of material forces by which the injury was produced. This is the basis of the distinction between conditions and causes. We may concede that all the antecedents of a particular event are

130. *Id.* at 211, 9 RUTGERS L. REV. at 460.

131. *Id.* at 215, 9 RUTGERS L. REV. at 463.

> conditions without which it could not exist; and that, in view of one or another physical science, conditions not involving the human will may be spoken of as causes. But, except so far as these conditions are capable of being moulded by human agency, the law does not concern itself with them. Its object is to treat as causes only those conditions which it can reach, and it can reach these only by acting on a responsible human will. It knows no cause, therefore, except such a will; and the will, when thus responsible, and when acting on natural forces in such a way as through them to do a wrong, it treats as the cause of the wrong.[132]

Wharton proceeded to elaborate a coherent explanation of the cases on the assumption that the proximate cause inquiry is the search for the last culpable human will in the causal sequence preceding plaintiff's harm.[133] Melville Bigelow, who adopted Wharton's approach *in toto* in his 1875 book on torts[134] criticized two leading cases (*Illidge v. Goodwin* and *Burrows v. March Gas*)[135] in which a defendant had been held liable even though his negligence had been followed by the intervening causal negligence of another.

In another section of his treatise, Wharton attacked the idea that foreseeability of harmful consequences determines either negligence or proximate cause. Wharton argued that if the harmful consequences of defendant's act could have been reasonably expected, "an intention to produce [those] consequences could [be] inferred. . . . The very gist of the [negligence] action . . . [is] that the consequences were not reasonably expected. . . . That though there was only a slight chance that such an injury would result, [Defendant was] so negligent or heedless as not to provide against such chance."[136] Wharton claimed that negligence was culpable inadvertence in the discharge of a legal duty, not failure to avoid foreseeable harm.[137]

Wharton and Bigelow's relentless search for the last culpable human will was not joined by the courts. In a leading 1878 case[138] the Court of Queen's Bench held that a landowner who negligently blocked a carriageway with potentially dangerous spiked stakes is liable for harm caused to plaintiff when an unknown third party removed the spiked

132. F. WHARTON, *supra* note 110, at 73-74.
133. *Id.* at 76-84.
134. M. BIGELOW, LEADING CASES ON THE LAW OF TORTS 608-613 (1875).
135. *Id.* at 611-12.
136. F. WHARTON, *supra* note 110, at 14.
137. *Id.* at 3.
138. Clark v. Chambers, [1878] L.R. 3 Q.B. 327.

stakes from the road and put them in the middle of an adjoining footpath. The court reasoned:

> [A] man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and if the should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriageway, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible.[139]

Wharton's theories, while brilliantly and learnedly elaborated, were seriously flawed. Wharton and Bigelow's "sequence and culpable will" thesis of proximate cause was inconsistent with both prior and subsequent cases. Wharton's distinction between physical conditions and human will as cause was not consistent with the prevailing scientific notion of causation as the set of all necessary conditions. And Wharton's suggestion that culpable human wills were causes in the full sense while other, physical necessary antecedents were merely conditions seemed to be based on a theologically-based privileging of human will over other elements in the natural order. This privileging was inconsistent with current "scientific" approaches to the place of human beings in the world.

Moreover Wharton's theory of proximate cause in negligence was based on his theory that negligence was culpable inadvertence in the discharge of a legal duty. But that theory of negligence seemed inconsistent with the case law. Oliver Wendell Holmes, Jr., in his 1881 masterpiece, *The Common Law*,[140] attacked the theory that negligence liability was based on a culpable human will. Holmes did not then elaborate a theory of proximate cause. He did, however, urge that harm foreseeable by the ordinary reasonable man in defendant's position was the touchstone of liability in tort in general and negligence in particular.[141] As we have seen, Wharton's proximate cause theories were attacked specifically by Frederick Pollock in his 1887 treatise on torts.[142] Pollock, influenced by his friend Holmes'[143] foreseeable harm theory of negligence and by his

139. *Id.* at 338.
140. O.W. HOLMES, JR., THE COMMON LAW 85-89 (M.D. Howe ed. 1963).
141. *Id.* at 86-89, 116-17.
142. F. POLLOCK, *supra* note 33, at 30-33.
143. Pollock dedicated his treatise to Holmes. *Id.* at v.-ix.

grandfather's espousal of a foreseeable consequence test of proximate cause,[144] urged a foreseeable consequences test of proximate cause.[145] Pollock shied away from any philosophic or scientific notion of causation altogether, however, with the comment that "the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."[146] For Pollock, the question was one of common sense, not of science or philosophy:

> There is a point where subsequent events are, according to common understanding, the consequence not of the first wrongful act at all, but of something else that has happened in the meanwhile, though, but for the first act, the event might or could not have been what it was. . . . In whatever form we state [the rule of proximate cause], we must remember that it is not a logical definition, but only a guide to the exercise of common sense.[147]

The courts, less attached to theoretical purity than the treatise writers, continued to use both sequence tests and foreseeability tests to explain their decisions in proximate cause cases. More and more cases seemed to be decided on proximate cause grounds as the nineteenth century drew to a close. Yet perceptive judges and lawyers may have come to feel that the doctrine was rootless—without scientific, philosophical, or analytical foundations. The debates in the treatises had made it clear that "proximate cause" had nothing to do with any current scientific notion of causation or causal sequence. The courts were obviously not applying the scholastic concept of proximate cause, and every attempt to apply any coherent notion of proximity or nearness in time, space, or causal sequence to explain or decide the cases had ended in failure. The foreseeable consequences test of proximate cause was not related in any obvious way to notions of causation at all, and it threatened to turn the proximate cause test into a redundant second application of the primary negligence standard of liability, also thought to be based on foreseeable consequences. Moreover, both of the significant tests for proximate cause—natural, continuous direct sequence, and foreseeable consequences—were couched in such general terms as to be indeterminate and hence useless as a guide to decision. Attempts to turn these general, indeterminate tests into specific, determinate tests either failed to satisfactorily account for all the leading cases, or were ultimately riddled with so many excep-

144. *See* Rigby v. Hewitt.

145. F. POLLOCK, *supra* note 111, at 21-45.

146. *Id.* at 33.

147. *Id.* at 32-33.

tions that they, too, became indeterminate, or were stated at a level of such extreme specificity that they became historical descriptions of the set of prior cases rather than analytically sound tests that adequately explained the prior cases and guided future decision. The proximate cause doctrine, more and more significant, yet more and more rootless, was ripe for debunking.

IV. MODERN NON-CAUSAL THEORIES OF PROXIMATE CAUSE AND DEVELOPMENTS IN THE 20TH CENTURY

A. Joseph Bingham and An Acceptable Theory of Proximate Cause

Dissatisfaction with proximate cause language was most forcefully expressed in 1909 by Joseph W. Bingham in an article modestly titled "Some Suggestions Concerning 'Legal Cause' at Common Law."[148] Bingham's brilliant work deserves close attention.

Bingham started by recognizing a simple, univocal "scientific" definition of a cause: "a condition, force, or omission was a cause of a status if that identical status would not have occurred but for the contribution of the condition, force, or omission."[149] Given this definition of causation, Bingham then argued that to determine whether defendant's wrongful conduct was the "legal cause" of plaintiff's damage the courts used cause in a qualified sense. The question is really whether defendant's conduct was a "legally blamable" cause of plaintiff's damage; that question cannot be resolved simply by determining whether defendant's conduct was a cause of plaintiff's damage. The "task is to determine whether defendant's wrongful act or omission was . . . a cause under such circumstances as to render him legally responsible to plaintiff for the specific . . . consequences."[150] Any question beyond the initial but-for causation question, then, is not a causal question at all, and formulating that question in causal terms is misleading, for "it naturally induces misapprehension that the inquiry in any concrete instance concerns only some subtle distinction between different kinds of causes in the 'chain of causation.' "[151]

Bingham then uses a hypothetical to show that questions of legal cause are not questions of the remoteness of the consequences, but questions of

148. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 COLUM. L. REV. 16 (1909) [hereinafter Bingham, Part I]; Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 COLUM. L. REV. 136 (1909) [hereinafter Bingham, Part II].

149. Bingham, Part I, *supra* note 148, at 23.

150. *Id.* at 35.

151. *Id.* at 36.

the scope of legal duties. A fire on defendant's riparian land uncontrollably spreads to the river, where it ignites floating oil accidently dumped by someone else into the river. The oil takes the fire downstream and burns plaintiff's house a mile away. If the defendant knew of the oil on the water, he will be held liable for the damage, because a court could find that he should not have built the fire given the known risk of igniting the oil and harming other riparian property. If he did not know of the oil, the damage will be held to be too remote. Since the causal sequence would be the same in both cases, Bingham concluded: "[W]e have no question of remoteness of consequences, but a question of definition of duty and a resulting discovery that the prevention of the consequences of which complaint is made is not 'within the limits' of any duty that defendant has infringed."[152]

Bingham, an early legal realist, saw legal duty as a concrete, specific obligation in a concrete, specific case, authoritatively determined by the court in a particular controversy after the fact. That meant that "a person's duty towards another in any concrete situation is what the Courts, acquiring jurisdiction of a suit between them involving the question, would adjudge it to be."[153] With this preliminary hypothesis that the legal cause question was a question of the scope and existence of legal duty, Bingham proceeded to analyze carefully a set of cases, focusing first on cases raising the question, "[f]or what consequences of an act or omission which constituted a breach of a legal duty owed *plaintiff* is defendant responsible to plaintiff?"[154]

Bingham studied thirteen cases intensively in this part of his paper. In each case, he found that the key to the decision was the purpose of the legal duty. He included the *Denny* and *Carter* decisions in this group. As to *Denny*, he said: "Is not the proper explanation of the decision this: that the duty to carry the goods with celerity was imposed to avoid losses of the sort which ordinarily follow a tardy receipt by a consignee; not to prevent such an adventitious contingency as produced the damage in this case?"[155] Bingham went on to compare *Denny* with another case:

> Compare with *Denny v. R.R. Co.*, *Fox v. Boston & Maine R.R. Co.*—In anticipation of approaching cold weather, defendant agreed with plaintiff to deliver a shipment of apples to a connecting carrier within a stipulated limit

152. *Id.* at 20 n.5.
153. *Id.* at 19.
154. *Id.* at 23-24.
155. *Id.* at 27.

> of time. Defendant negligently delayed delivery and the apples were frozen while in the hands of the second carrier after the date on which plaintiff should have received them. The Court held defendant liable for the damage. As Morton, C.J., pointed out, the damaging contingency was of a sort which should have been anticipated as an ordinary consequence of tardy transportation under the circumstances and which plaintiff sought to avoid by the contract stipulation that defendant broke.[156]

Bingham's commentary on the *Carter* case again emphasized the purpose of the defendant's duty:

> Defendants' delivery of the explosive into the custody of plaintiff was "legal" negligence towards him because there was evident risk that so young a child might be injured personally or suffer some other 'legal' damage by his mismanagement through lack of appreciation of the danger, or inability to use sufficient care. But when it had come under control of the aunt, that risk was over. Henceforward the care devolved on the adult custodians; and clearly no reason existed why defendants should be made involuntary sureties for their conduct, or for the efficacy of any measures they might take to keep the powder from plaintiff and thus avoid similar risks. Since, therefore, the purpose of defendants' infringed duty owed plaintiff was only the prevention of "legal" damage through the risk created by their wrong, the termination of that risk without damage marked the end of their responsibility.[157]

The court emphasized the purpose of the defendant's duty in another of Bingham's cases, the 1878 case of *Kennedy v. Mayor, Aldermen & Commonality of the City of New York*.[158] Plaintiff alleged that he was backing up his cart on a public wharf to load it with brick when his horse became unmanageable, through no fault of his own, and backed off the unguarded end of the wharf into the East River, where it was lost. Plaintiff alleged that defendant city was negligent in not providing a barrier at the end of the wharf. The trial court dismissed the complaint on the ground that the unmanageability of the horse and not the defect in the dock was "the cause" of the accident. The court of appeals reversed, pointing out that "the duty of the city to put a string-piece upon the dock . . . was imposed for the purpose of protecting persons and animals on the dock from falling into the water."[159] This purpose extended to protecting a momentarily unmanageable horse, when "a barrier is especially

156. *Id.* at 27-28 (citations omitted).

157. *Id.* at 29-30.

158. 73 N.Y. 365, 29 AM. R. 169 (1878).

159. *Id.* at 367, 29 AM. R. at 170.

needed."[160] The court concluded that, on the facts alleged, the absence of the barrier was the proximate cause of the loss of the horse.[161]

From this intensive analysis of specific cases, Bingham drew two conclusions:

> In those decided against defendant, the prevention throughout of the concrete sequence which produced the damage was within the limits of the purposes for which the unperformed duty was imposed; in those decided in favor of defendant, it was not within those limits. Isn't the obvious induction sound? Can't we correctly say that a wrong is not the "legally blamable" cause of a concrete sequence if the prevention of that sequence did not fall within the purposes of the infringed duty; and that if it is not the "legally blamable" cause of the sequence, it cannot be the "legal" cause of any consequence of the sequence? This sounds reasonable. Why should a defendant be responsible for occurrences entirely extraneous to the purposes of his duty? To hold him responsible would be to exact an arbitrary penalty beyond compensation for his wrong in the form of involuntary insurance. A more extended and detailed examination of cases than space permits will convince the doubtful that our generalization is not erroneous.
>
> Will the opposite induction hold true within the limits of our problem? Is a defendant responsible for any concrete sequence if the prevention of that sequence was within the purposes of his duty? Obviously, the answer *prima facie* should be "Yes." Otherwise there is an admission that a remedy will be denied a plaintiff for harm which by hypothesis defendant owed him the duty to prevent. Is there any principle, policy, or arbitrary rule within the bounds of our inquiry which further limits responsibility?[162]

After analyzing a set of cases involving injury to plaintiff from defendant's breach of a legal duty to a third party, Bingham concluded that they too involved "this common question: Were the chances of occurrence of the consequences which constituted plaintiff's harm within any of the dangers that provoked legal condemnation of defendant's conduct? If they were, he is 'legally blamable' for the harm; if they were not, he is not responsible for it."[163]

Bingham's theory was an analytical and persuasive achievement of the highest order. His explanation of the results of proximate cause cases in terms of the purpose of the duty breached rings true in the cases. Evidently, he had discovered a way to describe and explain the results in

160. *Id.* at 368, 29 AM. R. at 170.

161. *Id.*

162. Bingham, Part I, *supra* note 148, at 35.

163. Bingham, Part II, *supra* note 148, at 154.

proximate cause cases that did not use either the scholastic notion of causal potency or the empiricists' notion of learned causation from natural and probable sequences. Bingham's scientific theory seemed to save the cases without venturing into the thickets of causation. He had seemingly found a way to describe the realities underlying proximate cause cases, which was consistent with our modern understanding of causation.[164]

Bingham's theory contained one fatal flaw. Under his legal realist theory, the court authoritatively determines concrete legal duties in a specific adjudication; until then, the legal "duty" in the situation is just a prediction of what a court will decide. When Bingham refers to a legal duty and its purposes and applies it to the facts of the case, he is working backwards from the actual decision of the case, which fixes the legal duty, and, presumably, its purposes. Under Bingham's theory of duty, his theory of legal cause will always be true in every case. That is, if the question is the purpose and scope of the concrete legal duty imposed in this case, then the analysis will always be true by definition because the court's decision is a definitive judgment of the scope and purpose of the concrete legal duty in this case. Moreover, Bingham's rationale for supporting liability for breach of a concrete duty seems unconvincing if these are retrospectively decreed concrete duties. The only "duty" negligence law seems to impose ahead of time is the general duty to act as an ordinary reasonable person. That general duty will not help Bingham's argument, however, because it is not specified into a concrete duty with concrete purposes until the judicial determination. Moreover, Bingham rejects general duties as unreal—abstract concepts that provide a convenient way of referring to a multitude of concrete duties.[165] This extreme realism subsequently led Bingham to reject the specific command theory of law he elaborated in the *Legal Cause* article, since judicial determination of rights and duties after the event are not commands to the parties

164. A look at some typical examples suggests that "proximate cause" explanations using the old scholastic categories refer to the same reality as the duty-purpose explanations within Bingham's theory. (1) Speed has the capacity to bring about a particular position of a car at a particular point in time, but position alone does not have the capacity to cause an accident. This is like saying that the purpose of the rule against speeding is to prevent harm from impaired ability to stop, or avoid collision, or otherwise maneuver, not to keep you from getting to a particular point at a particular time. (2) Practicing medicine without a license does not, in itself, have the capacity to harm a patient. This is like saying that the purpose of the rule against practicing medicine without a license was to protect against unskillful treatment; if defendant treated plaintiff skillfully, even without a license, the harm was not within the hazard.

165. Bingham, Part I, *supra* note 148, at 17-21.

before the event.[166]

Because he rejected the prevailing notion of negligence as a breach of a generalized duty, his extreme legal realism led Bingham to the theory of specific duties and their purposes. Ironically, that realism also undermined his theory by making it both tautological and normatively empty.

One can save Bingham's theory of specific duties and their purposes, consistent with his own analysis. One need only see the duties in the first instance, not as judicially defined duties, but as social obligations derived from the community's accepted ways of doing things.[167] Community standards of coordinating behavior may be developed so that certain goods can be achieved by some, or certain evils can be avoided by others, if everyone follows the practice. For example, if everyone drives on the left, collisions can be avoided and everyone can get where they are going more quickly and safely. Everyone engaged in the practice understands what those purposes are. For the practice to give rise to a claim of wrong, therefore, the plaintiff must be within the group of those whose interests the practice was developed to protect, and the hazard by which he was harmed must be one that the practice was developed to avoid. Bingham's duty-purpose analysis applies without tautology to social duties associated with a community's coordinating conventions or practices. Plaintiff is wronged if she is harmed when defendant breaches a social convention whose purpose is to protect people like plaintiff from that kind of harm. Thus, the hazard/class test applied by the courts to determine when breach of a criminal statute will be deemed to be negligence *per se* is just one application of a more pervasive structure, embodied in both "duty" and "proximate cause" cases in negligence. The courts in a negligence action intervene to redress that private wrong, not to define legal rights and duties. The generalized duty of care pleading is a way of referring the question of duty back to the conventions and practices of the community without the need to plead them specifically. The ordinary reasonable man standard of care applied by the jury can be seen as a way of asking a cross-section of the community whether the defendant breached the relevant social rule or practice.

This alternative understanding of the duty-purpose approach is consistent with Bingham's analysis of individual cases, which included a number of negligence *per se* cases in the second half of his legal cause

166. Bingham, *What is The Law?*, 11 MICH. L. REV. 1 (1912).

167. For an elaboration of this theory of negligence law in detail, see Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Law*, CLEVE. ST. L. J. (in press).

analysis.[168] Furthermore, Bingham's formal emphasis on concrete legal duties defined after the fact by judges gives way in his actual analysis of the cases. Throughout his analysis, he implicitly accepts duties and their purposes as given before the adjudication, and he explicitly recognizes custom and usage as a consideration that judges balance in defining legal duties.[169] Nothing in Bingham's specific arguments for his duty-purpose analysis of legal cause limits him to legal duties defined *post hoc* by judges, and his analysis is more coherent if it is applied to social duties and their purposes derived from the community's coordinating conventions and practices.

This revised version of Bingham's explanation of proximate cause helps to solve a number of puzzles posed by the history and judicial application of proximate cause doctrine. First, this approach explains the relatively greater role of the judge vis-a-vis the jury in resolving proximate cause issues. Courts in the nineteenth century[170] (and courts today to a great extent)[171] decided proximate cause questions, more often than not, as matters of law, leaving few proximate cause issues for the jury. At first glance, this seems puzzling even under the above theory. If the negligence issue, which involves the question of the existence and content of preexistent community norms, is ordinarily left to the jury as a representative cross-section of the community, why should not the proximate cause issue, which involves the purposes of preexistent community norms, also be left to the jury?

A closer analysis, however, may resolve the puzzle. Negligence issues often involve complex and difficult questions concerning the scope and application of community standards. It makes sense to ask the jury whether, under the specific circumstances of the case, defendant violated an applicable community norm of behavior. Furthermore, this normative question is so closely tied to a precise determination of all the facts of the case that separating the two questions is likely to lead to confusion and error. The proximate cause issue is less closely tied to precise facts, since it focuses on the purpose, not the application, of the relevant community norm. Moreover, the purpose questions underlying proximate

168. Bingham, Part II, *supra* note 148, at 148-51.

169. Bingham, Part I, *supra* note 148, at 20 n.5.

170. *See, e.g.*, Denny v. New York Cent. R.R. Co., 79 Mass. (13 Gray) 481 (1859); Carter v. Towne, 98 Mass. 567 (1868).

171. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968). *See, e.g.*, C. MORRIS & C. MORRIS, JR., MORRIS ON TORTS 198-99 (2d ed. 1980).

cause issues are ordinarily easy questions on which reasonable people would all agree. So, for instance, the courts in *Denny* and *Carter* properly decided the proximate cause issues as questions of law under the usual directed verdict standard because reasonable jurors could not conclude that the breached community standards were intended to protect against those hazards. The apparently greater judicial deference to the jury on negligence issues, then, is not a real difference, since the different results stem from application of the usual standard for allocating decisions between the judge and the jury. The different results simply reflect differences in the nature of the two issues: the negligence issue involves simple questions with often complex, fact-specific answers; the proximate cause issue involves a complex question with simple answers. The differences further suggest that a jury decision may be less reliable on proximate cause issues than on negligence issues. It is one thing to ask the jury, as a cross-section of the community, whether that defendant's acts violate a community standard of conduct; it is quite another thing to ask that cross-section to delineate the purpose of that community standard. By living in the community, the jury would tend to know the community's standards and patterns of conduct. The jury might not be well-suited to answer the second question, however, because the answer requires an ability to reason and analyze—an ability to probe beneath the rules and patterns of conduct themselves to their function and purpose in a system of mutually coordinated, cooperative behavior.

The need for a judicial check of this kind on jury determinations of liability in negligence cases may explain the timing of the emergence of proximate cause limitations in the developing law. Proximate cause came in along with contributory negligence, privity, and the legislative purpose limitation on statutory negligence liability in the 1840s and 1850s, almost immediately after the two principal elements of negligence law—a pleaded general duty of care and the ordinary reasonable man standard of conduct—fell into place. As we noted above, privity and contributory negligence in their early appearances used proximate cause language, and early American statutory negligence cases were decided solely on proximate cause grounds. This suggests that all these doctrines are at some level closely related. And, on closer analysis, we can see that they are related both functionally and substantively. Functionally, they all serve to give the courts a means of limiting the scope of jury determinations of negligence. Each of them responds, in a slightly different way, to the grossly underelaborated concept of duty in the emerging law of

negligence. Substantively, they all seem to point to the same deep structure of a claimed wrong based on breach of a social rule whose purpose is to protect people in a certain class against hazards of a certain kind.[172] The statutory negligence hazard/class test most clearly points to this underlying deep structure, but the privity rules do, too, as they focus on the class to which contractually undertaken duties are owed. The contributory negligence rule, before its theoretical misinterpretation in deterrence terms towards the end of the nineteenth century, focused on whether plaintiff's abnormal behavior took her outside the scope of protection of the social rule defendant allegedly breached. Given the substantial redundancy and functional similarities of these four doctrines, it is not surprising that courts used proximate cause language in early contributory negligence and privity cases and in the later statutory negligence cases.

Finally, this analysis of proximate cause shows why causal language provides a plausible means to explain the court's conclusions. If the defendant's conduct breaches a social rule intended to protect against one hazard, and this particular breach causes plaintiff harm only because it also poses a second, different hazard against which no social rule protects, there will usually be clearly innocent conduct that would also pose that second hazard. In one sense, then, the defendant's *wrongful* conduct is not a necessary condition for plaintiff's harm, since alternative, hypothetically innocent conduct would have caused the harm as well.[173] Thus, in the precursor case of *Flower v. Adam*, the hazard that caused plaintiff harm was the hazard of wind-whipped dust spooking horses on the roadway, a hazard that could have arisen from defendant's innocently placing a lime rubbish heap by the side of, rather than in, the road.

B. Modern Proximate Cause Theories and Their Influence on the Leading Cases: Polemis, Palsgraf, *and* Wagon Mound II.

The theoretical explanation of the proximate cause doctrine suggested by Bingham seems, in retrospect, an acceptable, coherent way to retain the substance of the older doctrine within the newer conceptual framework. Bingham's explanation was not and is not generally accepted; an

172. For a fuller discussion of the conceptual redundancy of these doctrines in negligence law, see Kelley, *supra* note 167.

173. Perceptive modern scholars of cause-in-fact have noted that the negligent segment of defendant's conduct must be a cause of plaintiff's harm. *See* A. BECHT & F. MILLER, *supra* note 1, at 21-33. *See also* R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1737, 1763-74 (1985).

analysis of what prevented acceptance may be a good place to begin an examination of modern theories of proximate cause and their influence on judges.

The probable reason Bingham's redescription of proximate cause doctrine did not take hold was its inconsistency with the predominant theory of negligence liability, which held that the duty in a negligence case was a very general duty to avoid conduct posing a foreseeable risk of harm to others. Bingham's idea of specific, concrete duties was obviously at odds with this.

A deeper inconsistency existed between Bingham's theory and the prevailing theory of negligence, which followed O.W. Holmes, Jr.'s theory of torts. Holmes theorized that courts' decisions in tort cases necessarily rest on future-oriented legislative policies tending to promote the good of the community.[174] Holmes applied this "legislative policy" theory of judicial decision to torts, and, in so doing, eliminated from consideration the idea that the purpose of tort liability is to redress a private wrong, since that purpose does not qualify as a forward-looking legislative policy for the promotion of overall community happiness. Applying his theory of judicial decision to negligence, Holmes argued that the negligence liability standard forbidding conduct posing a foreseeable risk of harm to others rests on two legislative policies—maximum deterrence of dangerous conduct consistent with maximum freedom for individual action when such deterrence is not possible.[175]

Given deterrence as the basic purpose of tort liability, and the methodological elimination of the idea that redressing private wrongs could be a purpose of tort liability, Holmes's theory was incapable of even recognizing the basic problem with which the proximate cause doctrine deals. The basic proximate cause question—when is breach of a community standard that harms plaintiff nevertheless not a personal wrong to the plaintiff—is alien to Holmes's theory. For under Holmes's theory, every wrongful act is a breach of a judicial rule designed to promote the community's good by preventing foreseeable harm. The wrong is to the public, not to any particular person, and maximum deterrence would be achieved by imposing liability for all harm caused by breach of such a rule. Since tort liability is imposed to deter others from socially harmful conduct in the future, not to redress private wrongs, the distinction be-

174. O.W. HOLMES, JR., *supra* note 140, at 31-33.

175. *Id.* at 115.

tween breach of community standards and private wrongs, implicit in the proximate cause question, is rejected *ab initio* in Holmes's theory. Put more concretely, if defendant's conduct was negligent because it posed a foreseeable risk of harm to others, and it in fact harmed plaintiff, maximum deterrence of socially undesirable conduct would always be achieved by imposing liability for that harm on defendant. The proximate cause limitation on liability for harm caused by defendant's negligent conduct is, within Holmes's theory, inexplicable.

Holmes's theory purported to be a descriptive theory of torts, however, and although he never dealt with the problem of accounting for proximate cause cases, his successors did. The first and most obvious explanation of proximate cause cases apparently consistent with Holmes's theory was the "foreseeable consequences" theory, which said that proximate cause should be determined by asking whether plaintiff's injury was a foreseeable consequence of defendant's negligence.[176] As we have seen, Holmes's friend Frederick Pollock elaborated just that explanation. Under this approach, for example, the *Denny* case would be explained by saying that injury to plaintiff's wool by flood in Albany was not a foreseeable consequence of the negligent delay in shipping the wool from Syracuse to Albany. Since foreseeable harm was the basis for liability, under Holmes's theory, liability should be limited by foreseeability as well. If foreseeable harm was the limit of negligence liability, that limitation did not upset or change the balance struck between legislative policies of maximum deterrence of dangerous behavior and maximum freedom of action consistent with such deterrence.

The basic problem with the foreseeable consequences explanation of proximate cause stems from the indeterminacy of "foreseeability." Since almost anything is foreseeable, given enough time and incentive to project possible consequences, a test formulated in terms of "foreseeable consequences" provides no definite guidance for decision. Precisely because of this indeterminacy, however, it provides a seemingly unassailable basis for theoretical explanation of past judicial decisions. The theorist can say the result is based on the fact that the judge thought this consequence was foreseeable or that consequence was not. Given the indeterminacy of foreseeability, who can argue with these explanations?

176. *See* F. POLLOCK, *supra* note 33, at 36-37. *See generally* W. PROSSER, *supra* note 2, at 251-52.

For the same reason, "foreseeability" provides a convenient, virtually unassailable ground for judicial explanation of decisions.

The Achilles heel of this use of "foreseeable consequences" for theoretical explanation and judicial justification was revealed early on, in the 1921 British Court of Appeal case, *In re Arbitration Between Polemis and Furness, Withy & Co., Ltd.*[177] In that famous case, the plaintiff shipowners claimed damages for destruction of their ship caused by the negligence of the charter party. The ship's cargo included tins of benzine and/or petrol. The tins leaked and the hold was filled with petrol fumes. Stevedores hired by the charter party were engaged in shifting the benzine tins within the ship when a sling knocked a plank used as part of a scaffold in the 'tween decks into the hold. The falling plank hit something in the hold, causing a spark that ignited the petrol vapor. The ensuing fire destroyed the ship.

The claim was submitted to arbitration under the terms of the charter party agreement. The arbitrators specifically found that "the fall of the board was caused by the negligence of the [stevedores],"[178] and "that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated."[179] The particular arbitration procedure allowed the arbitrators to decide the case subject to review by King's Bench solely on questions of law. The arbitrators' findings of fact were nonreviewable. King's Bench affirmed the arbitrators' award of damages to the shipowners, and the charterers appealed to the court of appeal.

The arbitrators' findings on foreseeability in *Polemis* withdrew from the court the power to characterize certain consequences as foreseeable or unforeseeable in explaining its decision. The procedural posture of the case, therefore, precluded the court from taking refuge in the indeterminacy of "foreseeability." The court was thus forced to take one side or the other in the longstanding controversy over whether foreseeability of harm was relevant only to the issue of negligence, or was also relevant in determining the limits of liability for negligence under the proximate cause doctrine.[180] The court of appeal adopted the first approach. Lord

177. [1921] 3 K.B. 560, [1921] All E.R. 40.

178. *Id.* at 563, [1921] All E.R. at 42.

179. *Id.*

180. As Lord Justice Bankes explained it:

> These findings [of the arbitrators] are no doubt intended to raise the question whether the view taken, or said to have been taken, by Pollock, C.B., in *Rigby v. Hewitt* and *Greenland v. Chaplin*, or the view taken by Channell B. and Blackburn J. in *Smith v. London and*

Justice Bankes stated: "Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipation of the person whose negligent act has produced the damage appear to me to be irrelevant."[181] Lord Justice Scrutton explained that foreseeable damage was only relevant to determining negligence in the first instance. A negligent defendant would be held liable for damage "directly traceable to the negligent act," even if that damage is not "the exact kind of damage one would expect."[182]

When deprived of the convenient indeterminacy of the foreseeability notion, then, the court strained to reach the intuitively correct result, which it explained in terms of a "direct consequence of negligence" test for remoteness. But the "directness" or "indirectness" of a causal relationship is just as indeterminate a basis for decisionmaking as "foreseeable consequences," and it lacks the benefit of a theoretical underpinning. At least the foreseeable consequences test was rooted, however tenuously, in the utilitarian theory that the purpose of tort liability was to deter dangerous conduct. "Directness" was not only indeterminate, it was theoretically rootless, and hence fair game for subsequent theoretical attack.[183] The *Polemis* case thus marked the end of the simple "foreseeable consequences" theoretical explanation of proximate cause. The field was ripe for a different theoretical explanation. That explanation was not long in coming.

In 1927 Leon Green wrote a book entitled *The Rationale of Proximate Cause*.[184] This major theoretical work postulated that any tort has the following requisite elements: "(1) An interest protected, (2) against the particular hazard encountered, (3) by some rule of law, (4) which the defendant's conduct violated, (5) thereby causing, (6) damages to the plaintiff."[185] Green argued that in dealing with questions of "legal

South Western Ry. Co., is the correct one. . . . [T]he difference between the two views is this: According to the one view, the consequences which may reasonably be expected to result from a particular act are material only in reference to the question whether the act is or is not a negligent act; according to the other view, those consequences are the test whether the damages resulting from the act, assuming it to be negligent, are or are not too remote to be recoverable.

Id. at 568-69, [1921] All E.R. at 43.

181. *Id.* at 572, [1921] All E.R. at 45.

182. *Id.* at 577, [1921] All E.R. at 47.

183. *See* L. GREEN, *supra* note 2, at 118-21; Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449 (1930).

184. L. GREEN, *supra* note 2.

185. *Id.* at 3-4.

cause" or "proximate cause," courts have mistakenly considered as questions of causal relationship what are really problems of determining whether the legal rule allegedly violated by the defendant protects the affected interest from the particular hazard encountered.[186] The legal rule may be statutory or judge-made: the relevant questions of interest and hazard are the same in either case. Thus, Green clearly recognized the affinity between proximate cause questions and the hazard analysis in negligence *per se* cases. In this respect, therefore, Green's analysis was almost identical to that of Bingham's, which was published eighteen years before, and Green acknowledged as much.[187] Green, however, unlike Bingham, attempted to reconcile this theory of proximate cause with the prevailing theory of tort liability. This attempt resulted in two significant differences between his theory and Bingham's. First, Green emphasized much more strongly than Bingham the positive legal character of the duties involved in tort cases, and the consequent legislative function of courts. According to Green, in cases where neither statute nor precedent provide the legal rule, it is solely up to the court to determine whether to adopt the alleged rule, whether to extend the rule's protection to the interest affected, and whether the rule should protect that interest against the hazard encountered. Courts ought to accept their essentially policymaking function in deciding these questions.[188] In emphasizing the courts' creative lawmaking function, Green faithfully echoed Holmes's call for judges to recognize that their decisions must actually be based on legislative policy judgments.

Second, Green faced an apparent inconsistency between his theory of proximate cause, which treated proximate cause issues as problems of determining the scope of protection of *specific* legal rules, and the pre-

186. *Id.* at 39-40, 76-77, 122-24.

187. *Id.* at 42 n.98; 130-31.

188. [A]re judges in exercising this [creative law-making] function without guide? Clearly not. Aside from precedents and analogies which they have at their command, they may call to their aid every consideration that any other lawmaking body can invoke. They are aware of the conflicting and competing interests which demand the law's protection. They are acquainted with the habits and customs, the wants and desires, of the individuals and groups whose interests they are commissioned to protect. Their experience teaches them the range of human conduct and its effects. Their experience and understanding as individuals in society is their guide and based upon it they exercise their judgment as best they can. This must be the process of lawmaking and it is as certain and as much to be depended upon for the foundation of law as for the basis of other human institutions. The judge is bound by no narrow formula such as he employs to bind the jury which he instructs; the experience, the wisdom, the sense of an intelligent being, are his to use, and it is upon their use that the progress and the science of the law generally must rest.

Id. at 126-27.

vailing theoretical notion that negligence was breach of a *general* legal duty to avoid conduct posing an unreasonable foreseeable risk of harm to others. Green tried to resolve this difficulty by claiming that foreseeability of harm provides a unifying base for all the specific rules,[189] and that the jury in deciding whether defendant was negligent must determine "whether harm to plaintiff's injured interest could have been reasonably anticipated as probable by a person of ordinary prudence. . . ."[190] If the ultimate jury question is one of foreseeability, however, what has happened to Green's notion of specific legal rules? Green's theory at that point bordered on incoherence and was saved only by his assertion that the foreseeability standard as given to the jury was a fiction.[191] In the prevailing theoretical understanding, however, the foreseeability of the ordinary prudent person was not considered a fiction. Thus, Green's theory ultimately achieved consistency and coherence by rejecting the prevailing theoretical understanding of negligence in terms of foreseeability. For Green, foreseeability was a fiction we use to instruct juries and thereby conceal the jury's policy-based legislative judgment made after the judge has exercised his policy-based legislative judgment as to the scope of permissible jury decision.[192]

The next leading case in the modern saga of proximate cause, *Palsgraf v. The Long Island R.R. Co.*,[193] showed the weaknesses in Green's theory. In that case, plaintiff was a ticketed passenger waiting on a railroad station platform for her train. A man carrying a small bundle rushed to catch another train as it was leaving the station. He jumped aboard the moving car, but seemed about to fall back. A train guard on the platform pushed him from behind to keep him from falling. The push dislodged the man's package, which fell to the rails and exploded, as it

189. *Id.* at 64.

190. *Id.* at 67.

191. *Id.* at 72-73. Green's theory was as follows:

> The foresight of the ordinarily prudent person as it appears to the jury after the transaction is concluded is thus made use of as a negligence determinant. While the court by the use of this formula indicates to the jury a general standard of conduct for determining the quality of defendant's conduct, such standard is metaphysical. It has no certainty; it is in fact a *fiction*. . . . The jury must give life to the standard. Hence, the jury are compelled to determine in a measure what is best for the social interest in every negligence case submitted to them. Here the weighing of interests, those of the parties, as well as those of society, must be considered much as the judge must do in exercising his first function as already indicated.

Id. (emphasis added).

192. *Id.*

193. 248 N.Y. 339, 162 N.E. 99 (1928).

contained fireworks. The shock of the explosion knocked over some scales on the platform. The falling scales hit and injured the plaintiff.[194]

On appeal, the formal question was whether the trial court erred in denying defendant railroad company's motion to dismiss the complaint at the close of plaintiff's case. The court found, by a 4-3 majority, that the trial court should have dismissed the complaint. Judge Cardozo, writing the opinion for the majority, adopted a large part of Green's analysis. He said that "[N]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right."[195] Further, he recognized that defendant is liable to plaintiff in a negligence action only if the conduct causing harm to the plaintiff's legally protected interest violated a legal duty owed to plaintiff. Up to this point in the opinion, Cardozo's reasoning exactly parallelled that of Green's theory. But Judge Cardozo's definition of legal duty differed from Green's, for Cardozo held that the legal duty in negligence actions for personal injury is the duty to refrain from "conduct involving in the thought of reasonable men an unreasonable hazard [of an invasion of bodily security]."[196] Green would have had the courts determine the extent of the legal rule (and hence the scope of the duty) by an explicit policy judgment that balanced the competing social interests, not by reference to the unreasonable risk foreseeable by the ordinary reasonable man. Judge Cardozo went on to apply the foreseeability test to resolve the specific duty issue, arguing that since "nothing in the situation gave notice that the falling package had in it the potency of peril to persons [as far away as plaintiff]," no reasonable person could foresee any risk of harm to plaintiff from the conduct of defendant's servants.[197] Therefore, according to Judge Cardozo, the conduct of defendant's servants breached no duty to plaintiff.

In dissent, Judge Andrews characterized the problem as one of proximate cause, not duty, and refused to follow Green's suggestion that negligence should be broken down into specific relational rules or duties. Andrews, therefore, agreed with Holmes's view of negligence as a breach of a very general duty, owed by all to all, to refrain from conduct posing an unreasonable risk of harm to others. Since the jury could find that defendant's servants' conduct posed an unreasonable foreseeable risk of

194. *Id.* at 339, 340-41, 162 N.E. at 99.
195. *Id.* at 341, 162 N.E. at 99.
196. *Id.*
197. *Id.*

harm to the boarding passenger, the question of negligence was not at issue on appeal, and the only remaining question for Andrews was that of proximate cause: Was defendant's negligence a proximate cause of plaintiff's injury? At this point in his analysis, however, Andrews seemed to adopt Green's theory of judicial decisionmaking, for he said, "What we . . . mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[198] In determining whether sufficient evidence of proximate cause was presented in this case, however, Andrews referred to a set of decisional factors that incorporated past judicial proximate cause formulas, such as direct versus indirect, foreseeability, and remoteness in time and space. Nowhere did Andrews attempt to balance the competing social interests at stake.

Green's commentary on the *Palsgraf* opinions in his subsequent book *Judge and Jury* made clear that his theory of proximate cause was primarily a theory of judicial decisionmaking. According to Green, Cardozo's foreseeable risk formula and Andrews' direct-indirect formula are vain and fruitless attempts to control judicial discretion.[199] Moreover, both formulas are empty metaphysical concepts that cannot (and do not) guide judgment. Judges ought to recognize the formulas' metaphysical nature and purely ritualistic function and focus on the real policy questions necessarily underlying decision.[200]

The opinions in *Palsgraf* thus illustrate the principal weakness of Green's theory. Even judges persuaded that traditional proximate cause doctrines were theoretically bankrupt were unwilling to accept Green's invitation to ad hoc judicial policymaking. Judge Cardozo accepted Green's notion of specific duties, but applied it by reference to the prevailing legal understanding of the basis for negligence liability. Judge Andrews accepted Green's notion that proximate cause decisions were based on judicial policy judgments. In reaching his conclusion in this case, however, Andrews deferred to the tests for proximate cause drawn from precedent. Thus, although each was partially convinced, both Judge Cardozo and Judge Andrews recoiled from full acceptance of a

198. *Id.* at 352, 162 N.E. at 103. This was enough to move Leon Green in commenting on *Palsgraf* to call this statement "the high water mark of judicial expression explanatory of the proximate cause concept." L. GREEN, JUDGE AND JURY 247 (1930).

199. L. GREEN, *supra* note 197, at 247-49.

200. *Id.* at 265-67.

theory that would necessarily jettison deep-seated traditional understandings of the judicial function—that it is not legislative in function and process; that individual decisions must cohere with some overall preexistent normative and decisional structure; and that judicial decisions must be justified by showing their coherence with such a preexistent normative structure, and cannot be justified or validated by judicial *ipse dixit*.[201]

Green's insistence on the legislative function of courts and the importance of judicial policy decisions led him and his followers to lose sight of the hazard/class analysis altogether after *Palsgraf*.[202] Instead, *Ryan v. N.Y. Central R.R. Co.*,[203] a case in which the proximate cause holding was rather transparently based on legislative policy grounds, was elevated to paradigmatic status by Green's followers.[204] The proximate cause doctrine was thus seen as a cover for a wide range of legislative policies for limiting liability for harm caused by negligence.

The third major modern theory of proximate cause is essentially an attempted synthesis of Green's theory with the theory that negligence is conduct posing an unreasonable foreseeable risk of harm to others. This

201. The facts of *Palsgraf* assumed by Cardozo suggest an easy resolution of the case under the hazard/class analysis of proximate cause issues suggested above. If pushing the passenger with the package into the packed train breached any social rule at all, the purpose of the rule was to protect the pushed passenger and his package from harm, and to protect those he was pushed into. So the breach of that rule could not have wronged the plaintiff, who belonged to neither the class of those pushed nor the class of those pushed into. The hazard/class test, of course, could reach a different result if run on a presumed rule against putting heavy, unstable freight scales in passenger waiting areas.

202. See Green's analysis of the legislative policy factors that support the *Palsgraf* decision. L. GREEN, *supra* note 2, at 263-64.

203. 35 N.Y. 210, 91 Am. Dec. 49 (1866).

204. *See, e.g.*, W. PROSSER, *supra* note 2, at 257 n.75. For anyone familiar with the history of proximate cause in the nineteenth century, the elevation of *Ryan* to paradigmatic status is mystifying. For *Ryan*, which dealt with the liability of railroads for a negligently-caused fire that spread some distance from the source in its right-of-way, was followed by only one other state on the specific issue involved there. Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353 1869. It was rejected by every other state, and it was thought to have been overruled *sub silentio* in New York. *See* Webb v. Rome, W. & O. R. Co., 49 N.Y. 420 (1872); Lowery v. Manhattan R. Co., 99 N.Y. 158, 1 N.E. 608 (1885); Ehrgotta v. New York, 96 N.Y. 264 (1884). *Smith*, [1870] L.R.S.C.P. 98 (Comm. Pleas); *Kellogg*, 94 U.S. 469 (1876). Moreover, two influential cases thought to be leading cases in the nineteenth century — *Smith v. London & South Western Ry Co.*, and *Milwaukee & St. P. Ry Co. v. Kellogg* — raised almost precisely the same issue as *Ryan* and were decided contrary to the *Ryan* rule, with opinions specifically rejecting *Ryan*. What subsequent courts and commentators in the nineteenth century thought was wrong with *Ryan* was that it was based on policy, and not on the "true rule" of proximate cause. *See Kellogg*, 94 U.S. at 474; SHEARMAN & REDFIELD, A TREATISE ON THE LAW NEGLIGENCE 32-33 (5th ed. 1898).

"within the foreseeable risk" explanation was an attractive approach once the Restatement of Torts[205] adopted Henry Taylor Terry's[206] redescription of negligence as conduct posing an unreasonable foreseeable risk of harm to others. The next step was easy for those who wanted to retain the prevailing theoretical understanding of negligence and resist Green's attack on the possibility and utility of general normative theories. They would take Green's formal analysis of proximate cause in terms of the hazard the judicially-formulated rule was intended to protect against, and reject his contention that negligence is just a general filing category for a number of different, specific legal rules implementing judges' ad hoc policy judgments. Green's opponents could simply say that there was only one general rule in negligence cases: avoid conduct posing an unreasonable foreseeable risk of harm to others. The hazard that rule protected against was the unreasonable foreseeable risk. Defendant's negligence was not a proximate cause of plaintiff's injury unless plaintiff's harm resulted from a foreseeable risk of harm that made defendant's conduct negligent in the first place.[207] That specific risk would differ according to the particular conduct and the particular circumstances, but courts were not free to fashion particular rules and define by ad hoc legislative judgments the hazards to be protected by those rules: there was, after all, a principled normative solution to proximate cause questions, consistent with the prevailing theoretical understanding of negligence liability. Courts could decide proximate cause cases by applying general and accepted legal principles to the particular facts. Green's invitation to theoretical nihilism and judicial autonomy could be rejected, with thanks for pointing the way to the appropriate hazard analysis.

The "within the unreasonable foreseeable risk" analysis of proximate cause questions is a definite improvement over the simpler foreseeable consequences analysis. Indeed, the time of emergence and the structure of the "within the risk" analysis suggests that it is a simple corollary of the Terry reformulation. As theory, the within the risk explanation suffers from the same problems as the Terry formula, as it achieves after-the-fact explanatory power because of the indeterminacy of the various elements (foreseeability, reasonableness) in the formula, and by itself pro-

205. RESTATEMENT OF TORTS §§ 291-293 (1934); RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965).

206. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

207. *See, e.g.*, James & Perry, *Legal Cause*, 60 YALE L.J. 761, 783-811 (1951).

vides no guidance for decision. In practice, however, the within the unreasonable foreseeable risk analysis became by and large equivalent to the hazard analysis suggested above. The results were roughly the same as long as the courts kept the test tied to preexistent social reality by limiting it to harm foreseeable by the ordinary reasonable person, which the ordinary reasonable person would deem unreasonable.

Given these careful qualifications, the practical equivalence of the within the risk analysis with the hazard-purpose analysis could be maintained. Consider the recurrent example given by those explaining the within the unreasonable foreseeable risk test. Defendant gives a loaded gun to a young child, who drops it on her foot. Because the injury was not within the unreasonable foreseeable risk of injury from discharge of the gun that made the defendant's conduct negligent in the first place, defendant's negligence is not a proximate cause of plaintiff's injured foot.[208] The persuasiveness of this example, however, is parasitic on our understanding of the existence and purpose of the social norm prohibiting giving loaded guns to children. As long as the judge applying the unreasonable foreseeable risk formula defers, consciously or unconsciously, to his understanding of preexistent social norms and their purposes, the formula is harmless enough, and, as so qualified, leads in a roundabout way to the right answer. The danger comes from taking the formulation too seriously, and unhinging it from the preexistent social rules and their purposes on which it is parasitic; the danger comes from judges using the formula as a guide in making legislative policy judgments on utilitarian grounds.

This inherent danger in the modern theory of proximate cause was illustrated in the two leading cases adopting and applying the theory, commonly known as *Wagon Mound I*[209] and *Wagon Mound II*.[210] The two *Wagon Mound* cases arose out of the same incident. In the early hours of October 30, 1951, the *S.S. Wagon Mound*, an oil-burning ship, was moored at the Caltex Wharf on the north shore of Sydney Harbor, taking on furnace oil for its next voyage. Through the carelessness of the ship's engineer, a large quantity of furnace oil spilled into the bay, and by

208. *See* RESTATEMENT (SECOND) OF TORTS § 281(b), illustration to comment f (1965). *See generally* 4 F. HARPER, F. JAMES, JR. & O. GRAY, *supra* note 10, at 1136-37.

209. Overseas Tankship U.K. Ltd. v. Morts Dock & Engineering Co., Ltd., [1961] A.C. 388, [1961] 1 All E.R. 404 (*Wagon Mound I*) (New South Wales, Austl.).

210. Overseas Tankship U.K. Ltd. v. Miller Steamship Co., [1967] 1 A.C. 617, [1966] 2 All. E.R. 709 (*Wagon Mound II*) (New South Wales, Austl.).

10:30 a.m. on October 30 it had spread over a large part of the bay. It was thickly concentrated under and around Sheerlegs Wharf, just six-hundred feet from the Caltex Wharf. The manager of Sheerlegs Wharf, which was then being used to repair and refit the *Corrimel*, first instructed his workmen to stop welding for fear of igniting the furnace oil. After thinking it over and consulting the manager of the Caltex Wharf, however, he instructed his workmen to continue welding operations. Two days later the oil near the Sheerlegs Wharf was ignited by some smoldering cotton waste floating on the surface, set on fire by molten metal falling from the wharf. The fire severely damaged Sheerlegs Wharf and the two ships moored at the dock, the *Corrimel* and the *Audrey D.*

In the first case arising from this incident, the wharf-owner sued the charterers of the *Wagon Mound*.[211] The trial judge in the Supreme Court of New South Wales determined that "the defendant did not know and could not reasonably be expected to know that [the furnace oil] was capable of being set afire when spread on water."[212] The trial judge, nevertheless, found for the plaintiff wharf-owner on the grounds that the fire was the direct consequence of defendant's negligence and hence covered by the rule in *Polemis*. The Full Court affirmed, and the case was then appealed to the Privy Council, which reversed. In an opinion by Viscount Simonds, the Privy Council rejected the rule in the *Polemis* case and reasserted a foreseeability test of proximate cause. Viscount Simonds rejected the contention that defendants should be liable for unforeseeable fire damage just because it was foreseeable that the oil would clog the wharf owner's slipways. He concluded that the test for liability for fire damage is foreseeability of injury by fire.[213]

The second *Wagon Mound* case was brought by the owners of the two ships moored at the Sheerlegs Wharf. They sued on alternative theories of negligence and nuisance. The trial judge, after elaborate findings of fact,[214] found for the defendant on the plaintiffs' negligence claims.[215]

211. Overseas Tankship U.K. Ltd. v. Morts Dock & Engineering Co., Ltd., [1961] A.C. 388, [1961] 1 All E.R. 404 (*Wagon Mound I*) (New South Wales, Austl.).

212. *Id.* at 413, [1961] 1 All E.R. at 407.

213. *Id.* at 425-26, [1961] 1 All E.R. at 415.

214. *Wagon Mound II*, [1967] 1 A.C. at 633, [1966] 2 All E.R. at 712:

"(1) Reasonable people in the position of the officers of the *Wagon Mound* would regard the furnace oil as very difficult to ignite upon water. (2) Their personal experience would probably have been that this had very rarely happened. (3) If they had given attention to the risk of fire from the spillage, they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances. (4) They would have considered the chances of the required exceptional circumstances happening whilst the oil

On appeal, the Privy Council held that the trial judge's findings on the foreseeability question were sufficient to support liability on negligence grounds. Lord Reid pointed out that the trial judge's findings of fact differentiated this case from the first *Wagon Mound* case. In this case, the trial judge found that the officers of the *Wagon Mound* would have regarded ignition of the oil on the water as a remote, but foreseeable possibility. In the former case, the trial court had found that the officers "could not reasonably be expected to have known that this oil was capable of being set afire when spread on water." The difference in findings, according to Lord Reid, justified a different result. He argued that such a small foreseeable risk of fire alone might not deter the ordinary reasonable man if the conduct posing such a small risk were beneficial:

> A reasonable man would only neglect [a risk of such a small magnitude] if he had some valid reason for doing so . . . [and] [i]n the present case, there was no justification whatsoever for discharging the oil into Sydney Harbour. Not only was it an offense to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages.[216]

This reasoning strongly resembles the negligence calculus of the *Carroll Towing Co.* case,[217] whereby one decides whether defendant was negligent by comparing the burden of precautions to avoid the accident (B) with the foreseeable probability (P) and gravity of the injury preventable (L). If the burden of precautions is less than the probability multiplied by the gravity of the foreseeable harm, defendant was negligent ($B < P \times L$). Applying that test to *Wagon Mound II*, we see that since the burden of precautions to avoid spilling fuel oil always remains the same, we can add the P x L figures for *every* foreseeable risk of that conduct, regardless of its probability. Thus, the test under the *Carroll Towing* analysis would be whether

---

remained spread on the harbour waters as being remote. (5) I find that the occurrence of damage to the plaintiff's property as a result of the spillage was not reasonably foreseeable by those for whose acts the defendant would be responsible."

215. *Id.* at 641, [1967] 2 All E.R. at 712.

216. *Id.* at 642-43, [1967] 2 All E.R. at 718.

217. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

> [T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.

Id.

$$B < [P1 \times L1] + [P2 \times L2] + [P3 \times L3] \ldots [Pi \times Li]$$

where any loss [Li] is includible as long as it is foreseeable at all. This, of course, insures a finding of proximate cause whenever the defendant's conduct is negligent as to one risk, upon a determination that another risk, which eventuated in the harm to plaintiff, is foreseeable at all. This reduces the foreseeable risk formula to the foreseeable consequences formula, with all the problems that it entails. It is particularly pernicious because, given the basic problem the proximate cause question addresses (*i.e.*, is defendant's negligence a particular wrong to this plaintiff), it will almost always be clear that the defendant's conduct is negligent as to some risk, and liability for the harm to plaintiff will be imposed on a bare finding that the additional risk of harm was foreseeable. This formulation therefore stacks the deck in favor of a finding of proximate cause because it tends to eliminate the real proximate cause question. Further, it makes everything turn on the bare foreseeability of the additional risk, divorced from the qualifying factors related to reasonableness that have allowed courts using the *Carroll Towing Company* reformulation to make otherwise reasonable results seem consistent with the formula. For example, under *Wagon Mound II*, one giving a loaded gun to a young child could be held liable for the child's injured foot on a bare finding that the risk the child would drop the gun on her foot was foreseeable. And finally, it puts all-important weight on the indeterminate and indeterminable concept of foreseeability.

The two seemingly antithetical modern theories of proximate cause both stem from Holmes's theory of torts. The hard-line legal realists led by Green suggested that the proximate cause limitation on liability for negligence was a cover for a number of definite but inarticulate legislative policies unrelated to the central two policies reconciled by the basic negligence standard of conduct. The proximate cause cases seemed congenial to the realists' emphasis on that part of Holmes's theory that seemed to suggest that judges' explanations of their decisions rarely track with the real, legislative policy reasons for them. The Prosser and Keeton treatise follows in this legal realist tradition. The other approach was to suggest that the proximate cause limitation invoked the same basic legislative policies reconciled in the negligence standard, but with the emphasis on preserving freedom of action by protecting defendants from crushing and unlimited liability for all the results of a wrongful act. This approach again made use of that chameleon-like concept, foreseeability, but this time to limit liability, rather than to impose it. The Harper,

James, and Gray treatise follows in this tradition. Since foreseeability is a vacuous concept, it seems to explain the decided cases but provides no basis for deciding them. The "foreseeability" theorists thus provide a wonderful confirmation for the legal realist theorists. Since judges purportedly basing their decisions on foreseeability must in fact be deciding on the basis of something else, the faulty theory that leads courts to explain their decisions in terms of foreseeability ironically produces the best examples to support the alternative legal realist theory.

And so we go round and round, locked in a relentless rivalry between the normative and descriptive poles of a single fallacious theory in which the real proximate cause question cannot be asked.