

DUTY, FAULT, AND LEGAL CAUSE

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INTRODUCTION

When the Wisconsin Supreme Court, in *Osborne v. Montgomery*, in passing from a discussion of negligence to one of "proximate cause" said, "We enter upon a discussion of the matter of causation with still greater timidity",¹ it struck a familiar chord. This fatalistic attitude has not been dissipated by the literature on the subject; on the contrary, it has probably been enhanced. It may seem, now that the *Restatement of Torts* has been added to the numerous other treatises on "proximate cause", that this article is not timely. It would probably be difficult today to find a thought on the subject that has not been expressed in some way. A pattern can be found in a book or article to suit the most diversified tastes. Professor Edgerton's indefinite and unpredictable "Justly Attachable Cause" test stands at one extreme;² at the other, we find the concise, detailed principles of Professors Beale³ and Carpenter.⁴ The *Restatement* and numerous other treatments of the subject tread a course at various points between these two extremes.⁵

The objective of this article is specific. It attempts to prove that in the great majority of cases based on negligence, where it has been found that a party was negligent and that his negligence was a cause in fact of the injuries under consideration, the answer to the

¹ 203 Wis. 223, 233, 234 N.W. 372, 376 (1931). Similarly, in *Marble v. City of Worcester*, 4 Gray (Mass.) 395, 397 (1855), Chief Justice Shaw said: "The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of 'mystery'."

² Edgerton, *Legal Cause* (1924) 72 U. of Pa. L. Rev. 211, 343.

³ Beale, *The Proximate Consequences of an Act* (1920) 33 Harv. L. Rev. 633.

⁴ Carpenter, *Workable Rules for Determining Proximate Cause* (1932) 20 Calif. L. Rev. 229, 396, 471.

⁵ See Green, *Rationale of Proximate Cause* (1927); Green, *Judge and Jury* (1930); Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence* (1901) 49 Am. L. Reg. 79, 148; Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law* (1909) 9 Col. L. Rev. 16, 136; Smith, *Legal Cause in Actions of Tort* (1912) 25 Harv. L. Rev. 103, 223, 303; Terry, *Proximate Consequences in the Law of Tort* (1914) 28 Harv. L. Rev. 10; Leavitt, *Cause, Legal Cause, and Proximate Cause* (1922) 21 Mich. L. Rev. 34, 160; McLaughlin, *Proximate Cause* (1925) 39 Harv. L. Rev. 149.

On the administration of rules of "proximate cause" in particular states, see Boardman and Lundgren, *Proximate Cause in Wisconsin* (1929) 5 Wis. L. Rev. 142; Prosser, *The Minnesota Court on Proximate Cause* (1936) 21 Minn. L. Rev. 19; Keeton, *Negligence, Duty and Causation in Texas* (1937) 16 Tex. L. Rev. 1.

question of "proximate cause" follows with the same certainty that night follows day. It is based on the belief that confused notions of "proximate cause" have had a more serious effect on the practical administration of "mine run" cases than they have on the handling of cases where a real controversy exists in this respect. In isolating our problem it is necessary to re-examine the terminology and procedure employed in dealing with the policies involved, and the philosophy which explains them. The reader is asked to bear patiently with some repetition of ideas that are well known to students of tort law.

TERMINOLOGY AND PROCEDURE

The term "proximate cause" has been commonly used to describe limitations on liability and on the extent of liability based on (1) lack of causal connection in fact, and (2) policy factors making it unfair to hold the party.⁶ Experience has demonstrated that the name was an unfortunate selection.⁷ Its use has tended to confuse the issues in much the same way that the phrase "res ipsa loquitur" has hampered the normal use of presumptions and circumstantial evidence in the proof of negligence.⁸ The word "proximate" has unduly emphasized one out of a variety of factors. Associating it with the word "cause" has tended to confuse two distinct issues. In an article in 1912, Professor Jeremiah Smith suggested the use of the term "substantial factor".⁹ Minnesota apparently has adopted this terminology.¹⁰ England has indicated an affection for "direct consequences".¹¹ The *Restatement* uses "legal cause",¹² although it also includes additional limitations in its definition of negligence with respect to the protected interests involved.¹³ Dean Leon Green has consistently contended that the issue of cause in fact should be taken care of by "substantial factor" or some similar term, and that the remaining elements are problems of duty.¹⁴ This dissatisfaction with "proximate cause" may produce a more expressive terminology and

⁶ See notes 2, 3, 4 and 5, *supra*.

⁷ *Ibid.*

⁸ On the res ipsa loquitur problem, see Carpenter, *The Doctrine of Res Ipsa Loquitur* (1934) 1 U. of Chi. L. Rev. 519; Prosser, *The Procedural Effect of Res Ipsa Loquitur* (1936) 20 Minn. L. Rev. 241.

⁹ Smith, *supra* note 5.

¹⁰ Prosser, *supra* note 5.

¹¹ Goodhart, *The Unforeseeable Consequences of a Negligent Act* (1930) 39 Yale L. J. 449.

¹² §§430-462.

¹³ §281 (b).

¹⁴ Green, *op. cit. supra* note 5.

possibly a more logical procedure. But it must be remembered that fundamental questions are not usually solved by words. Any word or set of words will work if their meaning is a matter of common knowledge.

*Palsgraf v. Long Island Railroad Company*¹⁵ is a striking illustration of the importance we have attached to the manner of the expression of our conclusions. In that case X, carrying a package, was rushing to board a moving train. Two guards of the railway company attempted to assist him. In doing so they knocked the package from X's arms. The package contained fireworks, but there was nothing in its appearance to indicate this. It exploded with great violence. The concussion that followed knocked down some scales located many feet away. The scales struck and injured Helen Palsgraf who was waiting for a train. The court of appeals held that although the evidence justified a finding of negligence in the conduct of the employees of the railroad company toward X, they were not negligent toward Helen Palsgraf, and therefore she was denied relief.^{15a} If the same decision had been reached but had been based on the theory urged by the minority in the intermediate appellate court, it would have been received with at most a few passing comments. The dissenting group in that court contended that as a matter of law the defendant's negligence was not a proximate cause of the plaintiff's injuries.¹⁶ If the majority in the court of appeals had adopted this theory and based it on lack of foreseeability, it is probable that Judge Andrews would still have dissented. But if they had based it on a wider range of policy factors, Judge Andrews might well have felt that it was not sufficiently important to register a dissent. In fact he might conceivably have agreed with the result. The *Palsgraf* case provoked a vigorous debate not because Helen Palsgraf was denied relief against the railway company, but because Chief Judge Cardozo speaking for the New York Court of Appeals said that the defendant had not been guilty of any negligence with reference to her. The clarification in thought on the subject produced by this reasoning probably justifies the importance attached to the case. There is undoubtedly a basic distinction between the existence of a tort and the extent of liability for a tort. But because of the vital consequences that may follow this distinction, it is important that we use extreme caution in administering the technique employed in the *Palsgraf* case. This will be discussed more at length later in this paper.

¹⁵ 248 N. Y. 339, 162 N.E. 99 (1928).

^{15a} Judge Andrews wrote a dissenting opinion.

¹⁶ 222 App. Div. 166, 168 (1927).

We should give the *Palsgraf* case its proper place of importance in the realm of theory, remembering at the same time that it did not necessarily change the substantive law. A different court with the same social and economic views as the New York Court of Appeals might easily reach the same result by the use of the principles of "proximate cause". On the other hand, a court with the views apparently held by Judge Andrews might with equal facility decide that the question was one for the jury in administering the standard of determining "negligence toward the plaintiff" set up by Chief Judge Cardozo. An examination of cases decided by the New York Court of Appeals subsequent to the *Palsgraf* case discloses that it has not consistently followed the technique of that case.¹⁷ The sooner we realize that the issues involved are above words, phrases, and procedural concepts, the sooner we can examine what we have been doing and are doing with the critical attitude of one seeking for the truth.

An even more striking illustration of the point made is afforded by a comparison of the opinion of the Wisconsin Supreme Court in *Osborne v. Montgomery*¹⁸ with its opinions in cases decided before and after that case. The actual case involved a typical street accident. The defendant opened his car door in the path of the plaintiff who was approaching on a bicycle. The plaintiff was injured. The only problems of importance in the case were those of negligence and contributory negligence, respectively. But in dealing with the trial court's submission of the case to the jury, the supreme court considered at length the problem of "proximate cause". Prior to this case it had been held generally in Wisconsin that foreseeability of some harm to someone was an essential factor in negligence; that a more definite foreseeability of risk to the particular plaintiff or a person in his class, and probably to the general interests of that person which were involved, was required by the rule of "proximate cause".¹⁹ The opinion in the *Osborne* case stated that,

Assuming, however, that an actor is guilty of negligence which results in damage to another, what is the extent of his liability? It is often said that he is liable for all natural and probable consequences of his wrongful act. This is not the law in Wisconsin; his liability is not so limited.²⁰

¹⁷ See *Homac Corp. v. Sun Oil Co.*, 258 N.Y. 462, 180 N.E. 172 (1932).

¹⁸ 203 Wis. 223, 234 N.W. 372 (1931).

¹⁹ The attitude of the Wisconsin Supreme Court prior to 1929 is explained fully in Boardman and Lundgren, *Proximate Cause in Wisconsin* (1929) 5 Wis. L. Rev. 142.

²⁰ 203 Wis. 223, 236, 234 N.W. 372, 377 (1931).

Some attorneys apparently felt that the decision made a drastic change in the substantive law of Wisconsin. But before accepting this conclusion several factors must be considered. The actual case did not present the problem. And the court specifically retained two devices for limiting liability. In the first place, it pointed out that the law recognized limitations which could not be expressed in general phrases but must be applied to the facts of individual cases as questions arose. In the second place, it was recognized that intervening forces might operate to limit liability. The more accurate conclusion seemed to be that the decision reflected a more definite court consciousness of its own responsibilities in deciding policy factors. This is the feature which Dean Leon Green has emphasized in his numerous writings on the subject.²¹

*E. L. Chester v. Wisconsin Power & Light Company*²² was presented to the Supreme Court of Wisconsin two years after the decision in the *Osborne* case. The *Chester* case involved the responsibility of a gas company for the destruction of the plaintiff's building. Gas had escaped from one of the defendant's mains because of a defective valve and seeped twenty feet through the soil to the basement of a building owned by the plaintiff. An explosion followed, wrecking the building. In an action based on negligence, a verdict was returned in favor of the plaintiff. On an appeal of the case, one of the points argued by the defendant was the inadequacy of the instructions to the jury on the issue of "proximate cause". The supreme court held that there was error in this respect in that the instruction failed to give the jury an opportunity to relieve the defendant because of the unusual way that the hazard operated in this case; to wit, the gas seeped through the soil in less than two hours because the soil at this point was characterized by fissures, chasms, and voids, whereas under normal conditions it would have taken from six to nineteen hours. Foreseeability was not only recognized as an integral part of "proximate cause" but a new and more detailed foreseeability was required than had commonly been considered necessary in the past. The court readily recognized that it had generally paid slight attention to the fact that a foreseeable hazard operated in an unusual way. But it concluded that the question was one of degree, and that the operation of the hazard in the *Chester* case was so unusual that it might relieve the defendant, depending on the view taken by the jury.

²¹ Green, *op. cit. supra* note 5.

²² 211 Wis. 158, 247 N.W. 861 (1933).

The decision in the *Chester* case is convincing proof of the observation that the *Osborne* case did not enlarge the zone of liability. The court today frequently cites both cases with approval.²³ It apparently does not consider them inconsistent. It will be noted that in the *Chester* case the court reverts to the "proximate cause" terminology and procedure. But the most significant point in the *Chester* case is the ease with which the court decides that the policy problem is for the jury. It blandly reverses all it said in the *Osborne* case about the function of the court in deciding policy questions of this type, and at the same time cites that case with approval.

POLICY FACTORS IN "PROXIMATE CAUSE"

The extent to which fault was essential in early English law is not entirely clear.²⁴ However that may be, we are all familiar with the general rule today which requires a showing of fault in tort actions. The exceptions and qualifications of that rule are not pertinent here.²⁵ It is also well settled that liability is limited to consequences which can be traced to the fault, although in a few limited situations the law conclusively presumes some damage.²⁶ Cause in fact may be defined in various ways. Probably the substantial factor test of the *Restatement* is as satisfactory as any that can be stated. It is there said that,

The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense", which includes every one of the great number of events without which any happening would not have occurred.²⁷

It will be noticed that liability-producing qualities—culpable conduct—are not completely eliminated from this definition. But they at least

²³ For decisions citing the *Osborne* case in this connection with approval, see *Tetting v. Hotel Pfister*, 221 Wis. 141, 144, 266 N.W. 249, 250 (1936); *Bittner v. Miller*, 223 Wis. 162, 166, 270 N.W. 55, 56 (1936); *Scheibe v. Town of Lincoln*, 223 Wis. 417, 423, 271 N.W. 43, 46 (1937). For decisions citing the *Chester* case in this connection with approval, see *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 537, 252 N.W. 721, 728 (1934); *Riley v. Standard Oil Co. of Indiana*, 214 Wis. 15, 22, 252 N.W. 183, 186 (1934).

²⁴ Winfield, *The Myth of Absolute Liability* (1926) 42 L. Q. Rev. 37.

²⁵ Absolute liability under the common law is dealt with in the *Restatement of Torts* (Tent. Draft No. 12, 1935) §§504-524.

²⁶ Assault, battery, false imprisonment, trespass to land and libel and slander *per se* are well known examples.

²⁷ *Restatement, Torts* (1934) §431, comment *a*.

play an inferior part. It is the common sense connection between cause and effect that is of primary importance; not the probability of such a connection.

Using the definition of cause in fact stated above it may in fairness be asked why a party who is guilty of fault should not be obliged to respond for all consequences. The answer of courts to the question has been consistent. Liability has been delimited. Ways of expressing the delimitation have varied. Results in particular cases have not been uniform. But at some point along the line all courts have brought the responsibility for consequences to a halt. Why has this response been given with such uniformity? It is apparently another phase of the doctrine of fault. If a minor fault carried with it liability for all consequences however foreign to the particular fault, it would in effect impose a type of strict liability. A major difficulty in reducing the law of "proximate cause" to rules of thumb is this close relation between general doctrines of fault and questions of responsibility for consequences. It is undoubtedly somewhat unsatisfactory to leave the matter with the observation that it is simply a question of doing fundamental justice. There is a great deal of weight in Professor Carpenter's criticism that this view does not state a principle of law but rather the aim of all law.²⁸

The matter can best be dealt with by considering separately the commonly accepted branches of tort liability, to wit, negligence, intentional wrongs, and strict liability.

A. Negligence Cases

Most of the confusion in administering "proximate cause" has arisen in connection with actions based on negligence. The explanation for this is not as obscure as we are often led to believe. This confusion exists because the policy considerations controlling responsibility and the extent of responsibility for consequences are in many respects similar to those involved in deciding the general negligence issue. It has frequently been noted that "foreseeability" has been used in a double role. It is a factor in the issue of negligence, and is often stated as the test of "proximate cause". Although this has been criticized to some extent, it is submitted that it is not as illogical as it may look on the surface. It is not a useless duplication of the same point. In dealing with the negligence issue it means foreseeability of some harm to some person. As a test of "proximate cause", it means a foreseeability much more closely identified

²⁸ Carpenter, *supra* note 5, at 234.

with the particular plaintiff or the class of which he is a member and the interest of the plaintiff which is actually invaded. Criticism might be directed more accurately at the failure of the "proximate cause" test to include a question on the other basic factor in the definition of negligence, namely, whether the conduct was unreasonable under all the circumstances of the case.²⁹ Apparently one is relieved from responsibility for consequences in certain cases for much the same reason that he is held free from negligence in other cases. With respect to the *risk*, as distinguished from the *conduct*, which injures the plaintiff, the defendant has in fact exercised due care. When it is remembered that courts generally agree that on the one hand it is unnecessary that the exact operation of the hazard be foreseeable, and that on the other hand "foreseeability" means not merely a chance of harm but an appreciable one, the suggestion made above seems to conform closely to the actual administration of the "proximate cause" issue. Of course, if the dicta in *Smith v. London & Southwestern R.R.*³⁰ means what it is often said to mean,³¹ we have failed to explain that case. But interpreted in this way, the *Smith* case is out of line with most jurisdictions in this country³² and is of doubtful force in the law of England today.³³ It may be asked how the cases protecting one who goes to the rescue of another imperilled by the negligence of the defendant can be justified under our analysis. Common sense is necessary in the administration of any principle of law. If it is applied here, there will be no difficulty.

B. Intentional Wrongs

Although the policy factors which limit liability for the consequences of negligent acts are similar to the policy factors which determine negligence, it does not necessarily follow that they will be

²⁹ Keeton, *supra* note 5, at 8; Hirschberg, *The Proximate Cause in the Legal Doctrine of the United States and Germany* (1929) 2 So. Calif. L. Rev. 207, 231.

³⁰ L. R. 6 C. P. 14 (1870).

³¹ In that case Blackburn, J. said, "I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." If this and similar dictum of other members of the Court of Exchequer Chamber is construed to eliminate the substance of the limitations frequently administered under "foreseeability" in "proximate cause", it is out of line with the attitude expressed in this article. The views of various authorities of tort law on the *Smith* case are discussed and compared by Professor Goodhart, *supra* note 11. But *cf.* Green, *Judge and Jury* (1930) at 249.

³² See articles cited *supra* note 5.

³³ Winfield, *The Restatement of the Law of Torts—Negligence* (1935) 13 N. Y. U. L. Q. Rev. 1.

used to limit the responsibility for consequences of intentional wrongs. First, let us eliminate from our consideration cases involving responsibility to the state. We are interested here solely in civil responsibility. What is done or should be done in administering the criminal law is a substantially different problem.⁸⁴

It can be safely said that in civil cases the problem of extent of liability for the consequences of an intentional wrong has not been a serious one. Probably a qualification of this statement should be made in connection with deceit cases, although we do not hear much of them in this respect because the limitation is made under "right to rely" instead of "proximate cause". *Vicars v. Wilcocks*⁸⁵ stands as a familiar landmark in the field of defamation, but it has been discredited for years. A few arbitrary limitations are still recognized in defamation cases but they are comparatively unimportant.⁸⁶

The *Restatement of Torts* takes the position that where acts are in "reckless disregard of another's safety" a finding of causal connection may be justified, although if the acts were simply negligent the defendant would not be held.⁸⁷ And certainly, at least this strong a statement can be made of intentional torts generally which invade interests of personality, land or chattels. Actually, cases which recognize any limitation outside of the boundaries of cause in fact are hard to find,⁸⁸ except those based on the view that the interest involved is not entitled to any legal protection. Numerous devices are used to make the defendant responsible. In the case where *A* intends to injure *B* but by mistake injures *C*, the inquiry as to whether there is a wrong toward *C* is answered summarily by the fiction of transferred intent. *A* is liable to *C* although he did not intend to injure *C* and irrespective of his negligence toward *C*.⁸⁹ Naturally in most cases of this kind negligence toward *C* could be shown if such a showing was required. Some courts have extended this rule to cases where *A* not only had no reason to anticipate *C*'s presence but also did not interfere with *C* except through the chain of emotional

⁸⁴ On the problem in criminal cases, see Gausewitz, *Considerations Basic to a New Penal Code* (1936) 11 Wis. L. Rev. 346 at 380; Michael and Wechsler, *A Rationale of the Law of Homicide* (1937) 37 Col. L. Rev. 701 at 723, 1261.

⁸⁵ 8 East 1 (1806).

⁸⁶ See *Terwilliger v. Wands*, 17 N.Y. 54, 72 Am. Dec. 420 (1858); *Lehner v. Kelley*, 215 Wis. 265, 254 N.W. 634 (1934).

⁸⁷ §501 (2).

⁸⁸ See *Restatement, Torts* (1934) §§279-280. But cf. *Wendt v. Lentz*, 197 Wis. 569, 222 N.W. 798 (1929), criticized in Note (1929) 24 Ill. L. Rev. 232; *Koontz v. Keller*, 52 Ohio App. 265, 3 N.E. (2d) 694 (1936), approved in (1937) 35 Mich. L. Rev. 1197.

⁸⁹ *Restatement, Torts* (1934) §16 (2).

disturbance.⁴⁰ In bailment cases, where the bailee intentionally deviates from the terms of the bailment, he may be guilty of conversion in which case the relief normally given for a conversion follows as a matter of course.⁴¹ But in cases where courts have tempered the strict conversion rule, the bailee is nevertheless held an insurer of any damage caused by the deviation or occurring during the deviation, irrespective of whether such damage is probable.⁴²

C. *Strict Liability Cases*

Where the defendant is liable without fault, what is the extent of his liability? Rules of "proximate cause" used in deciding negligence cases or intentional wrongs are not of much assistance in answering this question.⁴³ We must study carefully the philosophy of the particular rule of strict liability and delimit responsibility for consequences accordingly. Where a hazard which caused harm is not within the policy of the particular rule of strict liability, fault with reference to that hazard must be shown as in other cases.

The rule of a number of jurisdictions that a common carrier is responsible in cases of negligent delay in shipping goods where they are destroyed by an act of God before delivery, irrespective of the likelihood of such destruction, has been criticized severely in recent years.⁴⁴ Undoubtedly if the principles of "proximate cause" which control negligence cases apply, this criticism is justified. But it must be remembered that this problem is somewhat different from that presented by a typical action based on negligence. As the Minnesota Supreme Court pointed out in granting relief under these circumstances in *Bibb Broom Company v. Atchison, Topeka & Santa Fe R. R.*,⁴⁵

Every reason in equity and justice relieves a carrier from the performance of his contract and from liability for injuries to property in his custody for transportation, resulting exclusively from an act of God, or other inevitable accident or cause over which he has no control, and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract, and by his unreasonable delay and procrastination is

⁴⁰ *Lambert v. Brewster*, 97 W. Va. 124, 125 S.E. 244 (1924).

⁴¹ Restatement, Torts (1934) §§227-228.

⁴² *Id.* §256.

⁴³ But *cf.* Harper, *Liability without Fault and Proximate Cause* (1932) 30 Mich. L. Rev. 1001.

⁴⁴ Restatement, Torts (1934) §451, comment *a*; Prosser *supra* note 5, at 52.

⁴⁵ 94 Minn. 269, 275, 102 N.W. 709, 711 (1905).

overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If, but for his negligence, the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause.

The vital question is how far the rule of strict liability for loss of goods by a carrier is to be extended. Or conversely stated, how far is the exception to that rule, relieving the carrier from consequences produced by an act of God, to be carried?

Strict liability cases where the "proximate cause" issue has been most troublesome have arisen under Workmen's Compensation Acts. In defining accidents "arising out of and in the course of the employment", courts have had to decide the extent of protection afforded the employee by the statutory rule of strict liability. "Proximate cause" decisions in other cases have not been particularly helpful guides. The issue is entirely different. The scope of a particular piece of legislation is involved, not the policy of the common law. It is probable, especially in view of the fact that these cases are handled in the first instance by commissions, that rule of thumb interpretations should be made as rapidly as possible.⁴⁶

POLICIES CONTROLLING LIABILITY AND EXTENT OF LIABILITY COMPARED

The "duty" device as a means of limiting liability in tort is a familiar one. It raises the broad question of legally protected interests. The discussion in this paper is based upon the assumption that this question has been answered in favor of the plaintiff.

The New York Court of Appeals in the *Palsgraf* case is not clear in its use of the word "duty". But it emphasizes the necessity of a wrong toward the plaintiff. This seems to imply the "duty" technique or something analagous to it. Thus, we find a substantial segment removed from the field of "proximate cause". The question of "cause in fact" naturally remains. And the court implies that the "proximate cause" question in its broader aspect remains. Let us hope the court does not contemplate an exact duplication of certain phases of the problem at this stage of the case.

The logic in saying that the defendant has not wronged the plaintiff at all, instead of finding a duty, a breach of duty, but a

⁴⁶ Professor Brown has treated this matter fully. See Brown, "Arising out of and in the Course of the Employment" in *Workmen's Compensation Acts* (1931-32) 7 Wis. L. Rev. 15, 67, (1933) 8 Wis. L. Rev. 134, 217.

lack of "proximate cause", is unassailable. But this logic involves dangers that must not be overlooked. Professor Goodhart called attention to this point shortly after the *Palsgraf* decision, using *In re Polemis*⁴⁷ as an illustration.⁴⁸ It is doubtful if a better case can be selected. It will be recalled that in the *Polemis* case it was found as a fact that *D* should have anticipated some damage to the ship by a falling plank and was negligent in this respect, but that *D* had no reason to anticipate the spark and fire which followed and destroyed the ship. *P* was allowed to recover the entire damage sustained. Let us assume that the ship was loaded. Would it matter that the cargo belonged to *X* instead of *P*?⁴⁹ Assume again that the fire spread to a nearby ship and destroyed it. Would the decision be affected by the fact that this ship belonged to *P* rather than to a third party? It is submitted that the problem is not one of title. The policies which control issues of liability and extent of liability in this respect are substantially alike.

The use of the *Polemis* case as an illustration is not intended to indicate an approval of the opinion rendered there. Professor Goodhart and other eminent English writers have indicated their lack of sympathy with the implications of the opinion in this case.⁵⁰ The decision of the House of Lords in *Liesbosch, Dredger v. S. S. Edison*⁵¹ in 1933 leaves the law of England in an uncertain state today. In distinguishing the *Polemis* case, Lord Wright said,

. . . that case, however, was concerned with the immediate physical consequences of the negligent act, and not with the co-operation of an extraneous matter such as the plaintiff's want of means. I think, therefore, that it is not material further to consider that case here. Nor is the appellants' financial disability to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage and the latter consideration goes to interference with profit-earning capacity; whereas the appellants' want of means was, as already stated, extrinsic.⁵²

⁴⁷ [1921] 3 K. B. 560.

⁴⁸ Goodhart, *supra* note 11, at 464.

⁴⁹ See Goodhart, *supra* note 11, at 466.

⁵⁰ See Goodhart, *supra* note 11; Pollock, *Liability for Consequences* (1922) 38 L. Q. Rev. 165; Salmond, *Law of Torts* (7th ed. 1928) §36.

⁵¹ [1933] A. C. 449.

⁵² *Id.* at 461.

This is without doubt a legitimate means of reconciling the actual decisions but the *Liesbosch* case is a distinct departure from the implications of the opinion in the *Polemis* case.

The *Restatement of Torts* in section 281 (b) relies largely on the *Palsgraf* case as a basis for its inclusion in the elements of a cause of action for negligence of the requirement that—

. . . the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected against unintentional invasion.

Under the wording of this section together with its comments, it is clear that the authors of the *Restatement* do not feel that the *Palsgraf* decision is limited to the question of whether a tort has been committed against the particular plaintiff.

This section of the *Restatement* is unfortunately in many respects duplicated by the later sections on "legal cause", especially where intervening acts are involved.⁵³ An artificial importance is attached to "intervening forces". In its effort to follow decisions in other jurisdictions and at the same time utilize the theory of the *Palsgraf* case, the *Restatement* has adopted a method of treatment which is about as confusing as any that could be devised. The scope of section 281 (b) should be extended to cover the entire set of policy problems commonly dealt with in the past under "proximate cause". This would put them in the phase of the case where Dean Green has consistently insisted that they should be placed, to wit, the duty stage. The section on causation could then be limited to the issue of whether the defendant's conduct was a substantial factor in producing the plaintiff's injury. This seems to be the sensible way to deal with the problem. But the older method of using "proximate cause" to cover both policy considerations and cause in fact is preferable to the position adopted by the *Restatement*.

"MINE RUN" CASES

A. In General

Writers on "proximate cause" have scarcely mentioned "mine run" cases. When they have, it has been to suggest that they do not present a problem. Paradoxically, they also generally agree that courts have reached results in the hard cases that are comparatively satisfactory. This would seem to imply that the problem is largely one

⁵³ Sections 430 to 462 deal with "legal cause".

of academic theory. It is submitted that cases which are "mine run" on issues of "proximate cause" present a more serious problem than those which involve a legitimate dispute in this respect. The latter involve highly controversial questions. Whatever action we take in these cases, we will never be certain that we have made the right choice. But we can and should simplify "mine run" cases and keep them as free from error as possible. We are using the term "proximate cause" in the broad sense in which it was commonly used before the *Palsgraf* case but *deleting from it the issue of cause in fact*. The law of negligence in its present state is a comparatively modern device. As it developed it was necessary to shape it to fit a highly diversified group of activities. With industrial accident cases gradually removed from orthodox common-law administration, the one large segment of specialized cases which had appeared was lost. But meanwhile another specialized group of cases was appearing—automobile accident cases. For some time over a million people have been injured and between thirty and forty thousand killed each year in automobile accidents in the United States. It is safe to say that not only the great majority of negligence cases but also the great majority of all tort cases today arise out of automobile accidents.

A study of these cases soon convinces one that they are almost invariably "mine run" with respect to the issue we are considering. Of course, there are exceptions. The *Restatement* cites one in its case of the defendant who negligently collided with a truck loaded with dynamite without knowledge of this fact.⁵⁴ Several people at different points were injured by the explosion. A newspaper a few months ago reported a collision where one of the automobiles continued down the street a block and knocked down a horse pulling a bakery wagon. Two bystanders tried to help the horse to its feet. It bit one on the leg and kicked the other in the ribs. But these are not typical cases. On the contrary, they are most unusual.

The jury is used freely in negligence cases in the United States and to a more limited extent in England to decide issues that are in no real sense simple issues of fact. Negligence is commonly referred to as a mixed question of law and fact, and one for the jury to pass on unless the situation is one where reasonable minds can draw but one inference. If the policy factors of "proximate cause" in negligence cases are similar to those in general negligence, as has been suggested above, it necessarily follows that the jury will perform a similar role here. This is the way "proximate cause" questions

⁵⁴ Restatement, Torts (1934) §281, illustration 1.

have commonly been administered. Whether the jury is a satisfactory body to handle any of these questions is not a matter that is open for consideration here. Whatever body is given the power to act, its conclusions should be free from the usual implications of the doctrine of stare decisis except where only one decision can reasonably be reached.⁵⁵ The trend in favor of standardizing conduct by definite legal rules, especially where the doctrine of negligence per se is applied in the construction of numerous "safety" statutes, should not be overlooked. Elaborate statutory regulations imposing criminal responsibility commonly control the operation of automobiles. But are the decisions in tort actions which treat a breach of these statutes as negligence per se satisfactorily rationalized by the law of negligence which is commonly used to explain them, or are they indications of a feeling that certain risks ought to be borne irrespective of fault? In answering this question one ought not to overlook the unsatisfactory results that have commonly followed the use of set patterns of negligence as a matter of law in dealing with the issue of contributory negligence.

The decisions in New York in cases involving liability for the spread of fire are an excellent illustration of the novel results which may flow from applying stare decisis rigidly in dealing with "proximate cause" problems. New York consistently held for many years that a person who either negligently set a fire or negligently permitted a fire to escape, was responsible for the first spread of the fire but no further.⁵⁶ In 1932, *Homac Corporation v. Sun Oil Company*⁵⁷ was presented to the New York Court of Appeals. In that case gasoline in one of *D's* storage tanks exploded due to *D's* negligence. Fire was communicated to other tanks which exploded. The fire spread across a bare roadway, sixty-six feet in width, and ignited building number one owned by *P*. The shortest distance from the nearest of the tanks to this building was seventy-seven feet. The fire soon spread to buildings number two and three and destroyed them. These structures were also owned by *P*. The jury returned a verdict for *P* for the entire damage and judgment was given on the verdict. The court of appeals affirmed the judgment. This appears to be a rea-

⁵⁵ See Bohlen, *Mixed Questions of Law and Fact* (1924) 72 U. of Pa. L. Rev 111.

⁵⁶ *Webb v. R. W. & O. R. R.*, 49 N.Y. 420 (1872); *Read v. Nichols*, 118 N.Y. 224, 23 N.E. 468 (1890); *Hoffman v. King*, 160 N.Y. 618, 55 N.E. 401 (1899); *Rose v. Pennsylvania R. R.*, 236 N.Y. 568, 142 N.E. 287 (1923). The decision in *Ryan v. N. Y. C. R.R.*, 35 N.Y. 210 (1866) which founded the rule imposed an even more limited liability.

⁵⁷ 258 N.Y. 462, 180 N.E. 172 (1932).

sonable conclusion: But in order to reach it and remain within the stare decisis principle, the court made two assumptions that are difficult to support on any rational basis. First, the court inferred that if the roadway had been covered with combustible material and the fire had been carried by this to *P*'s building number one, *P* would not have been able to recover because the first spread would then have been that which ignited the roadway. Obviously, on any sensible theory, the reverse of this proposition should be the law. As the amount of combustible material between the fire set by *D* and *P*'s house is increased, there is greater likelihood of damage to that house and *D*'s liability should be clearer. Second, under the decision, if some party other than *P* had owned buildings two and three, he could not have recovered. It hardly seems fair that liability in a case of this type should depend on the chance that title rests in a particular person. The only explanation of the views expressed by the court is that in fairness the plaintiff is entitled to the relief that he was given. A better method of reaching the result would have been to expressly overrule the earlier decisions.

B. Submission of Negligence Cases to the Jury

The negligence network is an elaborate and complicated one. Examine the concepts employed: duty, negligence, proximate cause, damages, contributory negligence, comparative negligence, last clear chance, imputed negligence, gross negligence, wantonness, and contribution. The jury's problem is bound to be a difficult one under the most favorable conditions. We must continually strive to find simpler and more understandable methods of submitting the features of a case that require a decision by the jury. It is equally important that we do not aggravate the task of the jury by asking it to pass on issues that can be answered easily as a matter of law. Naturally in cases where this is a close question the trial judge will be inclined to leave it to the jury in the first instance. This practice is desirable as it may happen that the jury will reach the same decision that the judge was contemplating, in which event the risk of reversal will be materially reduced. This is an added reason for recognizing as a matter of law that in the great mass of cases when the jury has found that the defendant is negligent and that his negligence is a substantial factor in producing the plaintiff's injuries, there is no real controversy on "proximate cause". Furthermore, it is probable that clarification on this point will enable the court to dispose of the substantial factor issue as a matter of law in a great many instances.

The Supreme Court of Minnesota tends to use the "substantial factor" test as a general solvent for "proximate cause".⁵⁸ As Professor Prosser has pointed out, this solution is not entirely satisfactory.⁵⁹ But if the court insists on a standard formula for all cases it seems better to select one that states the real issues in the great mass of cases than one which is a confusing and unnecessary burden in all but a few cases.

Our methods of selecting patterns for instructions have not generally been scientific. Usually a particular form is adopted because it has at some time been approved by the highest appellate court. The insufficiency of a pattern commonly is not seriously urged before the higher court unless it is a questionable one. When approval has been given, trial courts hesitate to make alterations because of the danger of reversal. Although the courts, both trial and appellate, are endeavoring to meet this situation, it continues to present a serious problem.

Two stock arguments can be expected when one suggests that an effort be made to simplify the method of submitting the "proximate cause" question to the jury. It will be said that if the jury finds a person negligent it will almost invariably give an affirmative answer to the "proximate cause" question. This probably is a substantially accurate observation, although it seems to rest largely on a hunch, coupled with the consideration of a limited number of cases. But certainly we have no way of ascertaining what effect the confusing terminology in submitting "proximate cause" may have on the jury's grasp of the negligence concept. It will also be argued that juries rarely deny relief to an individual who has been injured, especially where wealthy corporations or individuals are defendants. It seems clear that this does not relieve judges and lawyers of their obligation to present understandable issues to the jury in order that it may be in a position to render a fair and unbiased judgment.

An Illustration—The Situation in Wisconsin. Space will not permit a detailed consideration of this problem by individual states. Wisconsin has been selected for illustrative purposes primarily because the author is better acquainted with the details of the situation there than elsewhere.

Wisconsin lawyers generally agree that the patterns for submitting the issue of "proximate cause" to the jury prior to 1927 were unsatisfactory. They were largely based upon technical definitions that had

⁵⁸ Prosser, *supra* note 5.

⁵⁹ *Id.* at 67.

been sanctioned at some time by the supreme court. In 1927, attention was focused on the problem by the inconsistent verdict reached in *Berrafato v. Exner*.⁶⁰ The supreme court pointed out that the current methods of submission did not afford the jury much light upon the subject, and readily shouldered part of the blame for this condition. It was decided that the best solution was to frame the special verdict in such a way that a definition of "proximate cause" in the instruction would be unnecessary. For those who are unfamiliar with Wisconsin practice, it should be mentioned that the special verdict is almost universally used in Wisconsin in the administration of negligence cases. The court phrased its recommended form as follows,

Thus, the first question may ask the jury to find whether the defendant failed to exercise such care as the great mass of mankind ordinarily exercises when acting under the same or similar circumstances with reference to the particular conduct complained of. Question 2 can inquire as to whether the plaintiff's injury was the natural and probable result of such want of ordinary care on the part of the defendant; and question 3 may inquire whether the defendant ought, as a person of ordinary intelligence and prudence, reasonably to have foreseen that injury to a traveler upon the highway in question may probably follow from such want of care on his part.⁶¹

The court apparently felt that this would leave the jury to deal solely with questions of fact; thus, "they are not called upon to dispute among themselves upon questions of law, of which none of them have more than a hazy conception".⁶² The striking fallacy of this reasoning is the assumption that the questions stated present pure issues of fact. The most skillful lawyer will have difficulty in construing the pattern unless he knows in advance exactly what the

⁶⁰ 194 Wis. 149, 216 N.W. 165 (1927). In this connection, the supreme court said:

"The manifest inconsistency of the verdict relating to the negligence of the two plaintiffs is relied upon for a reversal of the judgments. It will be noticed that the jury found the plaintiff Harvey, the driver of the car, guilty of a failure to keep a proper lookout, but that such failure was not the proximate cause of the collision, while by the answer to question 8 the jury found that the plaintiff Berrafato was guilty of a want of ordinary care which proximately contributed to his injuries. As Berrafato had nothing to do with the driving or the managing of the car, it is apparent that the only negligent conduct on his part was a failure to keep a proper lookout. They found that this failure contributed to Berrafato's injury. They found that the driver of the car failed to keep a proper lookout, but that such failure did not constitute a proximate cause of the collision. The inconsistency of these two answers is apparent."

⁶¹ *Id.* at 157, 216 N.W. at 168.

⁶² *Ibid.*

court has in mind. Question 3, placed as it is, seems to be a complete misfit. Question 2 presents the confusing mixture of cause in fact and policy limitations on liability that has been the source of so much trouble in dealing with negligence cases. One can hardly blame a jury for feeling that it is free to follow its personal fancies.

Two years later, in *Hamus v. Weber*,⁶³ the court approved a substantially different plan for presenting the case. The jury was asked to find,

(1) In operating his automobile at the time when it was overturned on the highway, on December 3, 1927, was the defendant Weber negligent in respect to speed and control of the car?

(2) If you answer the first question "Yes", then answer this: Was the defendant Weber's negligence a cause of the plaintiff's loss and injuries?⁶⁴

The instructions contained a definition of negligence phrased wholly in terms of foreseeability. An instruction on causation was also given, framed exclusively in terms of cause in fact.

The problem was considered in detail by the supreme court again in 1931 in the case of *Osborne v. Montgomery*.⁶⁵ The opinion in that case indicates an approval of the general plan of *Hamus v. Weber*, but criticized the instruction given in connection with the question on negligence. The majority of the court felt that the instruction not only completely failed to indicate a standard by which the conduct of the defendant was to be measured, but also required a foreseeability of consequences in much more specific form than the law demanded.⁶⁶ In other words, the supreme court is saying that its description of negligence in 1929 was almost one hundred per cent inaccurate. This would appear startling to one not fully acquainted with the diversity of damaging effects produced by our confused notions of "proximate cause".

The court has consistently sustained the pattern approved in *Berrafato v. Exner*, and it is used to some extent today. The court has also uniformly held that there is more than one proper way to present the issues.⁶⁷ A form which contains special verdict questions

⁶³ 199 Wis. 320, 226 N.W. 392 (1929).

⁶⁴ *Id.* at 323, 226 N.W. at 393.

⁶⁵ 203 Wis. 223, 234 N.W. 372 (1931).

⁶⁶ Justice Fowler, however, filed a special concurring opinion in which he approved the pattern for instructions used by the trial court. 203 Wis. 243, 234 N.W. 380.

⁶⁷ In *Williams v. Williams*, 210 Wis. 304, 246 N.W. 322 (1933), the questions submitted to the jury were:

"(a) Was defendant negligent in operating his automobile at the time of the accident? (b) If yes, Did the negligence cause the plaintiff's injuries? (c)

following substantially the plan of *Hamus v. Weber*, coupled with an instruction on negligence conforming to the definition in *Osborne v. Montgomery*, and one on causation that varies somewhat in detail is used in a number of circuits today. Under either form where several acts of alleged negligence are involved they are treated separately.

The *Berrafato* pattern seems to be unduly complicated in submitting "mine run" cases. It is also doubtful if it is a desirable method of submitting any case. The other pattern mentioned presents simply but accurately the controversial issues in a "mine run" negligence case. Where it is followed by the careful definition of negligence stated in *Osborne v. Montgomery*, the one danger is that confusion will be introduced in the definition of "proximate cause". If this is defined somewhat as "substantial factor" was used earlier in this article, the submission of the "mine run" case seems complete. Of course, there will be some instances where an issue of "proximate cause" in its broader implications will arise. In those situations, the pattern for submitting the case will have to be moulded accordingly.

Was the plaintiff negligent in standing where she was struck? (d) If yes, Was her negligence a cause of her injuries? (e) What sum will reasonably compensate the plaintiff?"

In analyzing this pattern the supreme court said:

"... there is ordinarily more than one way in which to present the issues of a case for determination, and trial judges are permitted to submit them in such way as they deem fit, provided they submit them properly, and the simpler and more direct the submission is the better it is. Here the crucial facts were too simple to require any long, involved, and cumbersome questions, and we consider that the questions here used succinctly and properly submitted the ultimate issues of fact."

The court stated its position in *Hoffman v. Regling*, 217 Wis. 66, 70, 258 N.W. 347, 349 (1935), as follows:

"We are of opinion that the form of the first question of the verdict, which is set out in full in the statement of facts preceding the opinion, cannot be approved, and that the use of it was prejudicial error. It is so long and involved as to be incomprehensible to a jury. It confuses rather than clarifies. A verdict should be as short and simple in form as it is possible to make it. Generally speaking, three different methods of submitting the question of a defendant's negligence in automobile collision cases by special verdict have been approved by this court. One inquires whether the defendant failed to use ordinary care in such respects as the evidence may indicate, followed by an instruction defining ordinary care. The other two forms are sufficiently indicated in *Berrafato v. Exner*, 194 Wis. 149, 216 N.W. 165, and *Osborne v. Montgomery*, 203 Wis. 223, 234 N.W. 372. The form first above mentioned was in general use in automobile collision cases from the time of the decision in *Anderson v. Sparks*, 142 Wis. 398, 125 N.W. 925, up to the time of the decision in the *Berrafato Case*. It would seem entirely unnecessary and not advisable to attempt any radical departure from methods of submission that have heretofore been approved by this court. These three general forms would seem to afford a sufficient field of choice. It is possible that some other form of submission may be devised that is equally good or better, but experimentation with other forms is likely to result in mistrial and is not deemed advisable."

The exact issue in those cases is a question of substantive law that has not been specifically answered in Wisconsin. When we find out what the rule is, it should not be difficult to incorporate it in our pattern in the few cases which are not "mine run" in this respect.

CONCLUSION

This paper is predicated on the proposition that in the great majority of cases based on negligence where it has been found that a party was negligent and that his negligence was a substantial factor in causing the injuries under consideration, no question of "proximate cause" remains. If this premise is false, we apparently have not made much progress in our development of the law of negligence.

Three decisions of the Wisconsin Supreme Court in its January 1936 term seem to question it. If these cases had been decided twenty or thirty years ago, or if only one such decision had been made instead of three, we might dismiss the matter lightly. But appearing in the way they do, these decisions demand our careful scrutiny.

In *Brager v. Milwaukee Electric Railway & Light Company*,⁶⁸ *G* was riding with *H* in *H*'s automobile. *D*'s interurban car was approaching at a high rate of speed. The motorman saw *H* and *G* but thought they would stop. He sounded his whistle. *H* and *G* were apparently engrossed in their conversation and did not see the approaching car. When the motorman realized that they were going to cross the track he attempted to stop the car but could not do so. A collision occurred and *G* was killed. The jury found that *D*'s motorman was negligent as to speed and that this negligence was a proximate cause of the collision; that *H* was negligent as to lookout and control and that his negligence in each of these respects was a cause of the collision; that *G* was not negligent; that *D* was 20 per cent negligent and *H* 80 per cent negligent. The supreme court took the position that as a matter of law the failure of *H* to stop was the proximate cause of the collision and that the speed of the interurban car was not such a cause.⁶⁹ The court apparently reached this conclusion on the theory that *H* was in no way misled by the speed; that he made no calculations based upon it as he apparently did not see the interurban car. Undoubtedly if the negligent speed was not a cause of the collision *D* should not be held responsible. But the facts do not seem to justify this conclusion. If *D* had been traveling at a

⁶⁸ 220 Wis. 65, 264 N.W. 733 (1936).

⁶⁹ Accord: *Bleul v. Milwaukee E. R. & L. Co.*, 223 Wis. 414, 271 N.W. 1 (1937).

reasonable rate of speed it is difficult to tell what might have happened. This is emphasized by the latter part of the opinion itself where the court holds that there was no negligence on the part of the motorman in failing to stop the car after discovering that *H* and *G* were going to cross the track because he could not be expected to stop it within the short time available. If the interurban car had been going at a reasonable rate of speed under the circumstances the motorman might, after he became aware of the risk to *G*, have stopped the car. The danger of an accident of this kind was one of the hazards which make it negligent to operate the car at this speed. We have assumed as the court did that the evidence supports the jury's finding that *D* was negligent as to speed. The court might conceivably have held that the social utility of speedy transportation of the public on interurban cars outweighed the risks involved to such an extent that as a matter of law *D* was not negligent.

In *Byerly v. Thorpe*,⁷⁰ *P* was a guest in an automobile which was traveling about thirty-eight or forty miles an hour on its proper side of the highway. *D* was approaching from behind in his automobile. He was about to turn out to the left to pass when his left rear tire suddenly deflated. His car swayed violently and in attempting to straighten it he struck the left side of the rear bumper of the car *P* was riding in. *D* had his brakes on at full force at this time. *P* was injured. The jury found that *D* was negligent with respect to (1) the speed at which he drove, (2) the manner in which he drove, managed and guided his automobile, and (3) the distance at which he followed the automobile *P* was riding in just before the collision. The jury also found that these acts of negligence were causes of the collision. The evidence disclosed that the left rear tire had gone only about 5000 miles. The deflation was sudden, being caused by a puncture which deflated the tire almost as fast as most blow-outs would have done. The supreme court took the position that the real and efficient cause of the accident was the deflated tire rather than the acts of negligence found by the jury.⁷¹ Does this mean that one is free

⁷⁰ 221 Wis. 28, 265 N.W. 76 (1936).

⁷¹ In its opinion the court does not mention *Murray v. Yellow Cab Co.*, 180 Wis. 314, 192 N.W. 1021 (1923). In that case the jury found that the defendant's agent operated a taxi cab in excess of the fifteen mile per hour speed limit applicable to the place where the plaintiff was injured. The plaintiff was a pedestrian and was struck when the left front wheel came off the cab. It appeared that a broken spindle pin, apparently resulting from a crystallized condition, had caused the wheel to fall off. No attempt was made to show that there was any negligence on the part of the defendant in failing to discover this condition. In holding that the jury was justified in finding that the negligence of the driver of the cab as to speed was a proximate cause of the plaintiff's injury, the court said:

from responsibility for a negligent act unless he as a reasonably prudent man should have specifically foreseen as a probability every factor entering into the chain of consequences? If the case means this it is out of line with prior rulings in Wisconsin as well as with decisions generally throughout the United States. Why is it negligent to drive an automobile under certain circumstances at a particular rate of speed? Apparently negligence in this respect is found on the theory that numerous things may happen to cause a loss of control which may result in serious damage to others. It seems clear that the hazard of a deflated tire is one of the factors that combines with speed and other circumstances to make that speed unreasonable.

In *Swinkels v. Wisconsin Michigan Power Company*⁷² the accident occurred around midnight. *P* overtook *D*'s bus which was traveling about a foot and a half over the black line designating the center of the highway. As *P* came up to the bus, he did not decrease his speed or trail the bus at all but, after giving two short blasts on his horn, attempted to pass it. *D* failed to give way to the right. According to *P*'s testimony, *D* further invaded the left side of the road so that the bus was about three feet over the black line when the front of *P*'s automobile was about opposite the middle of the bus. While in the act of passing, *P*'s automobile left the highway and turned into the ditch. At no time was there any actual contact between *P*'s automobile and *D*'s bus. The jury found *D* negligent in operating its bus to the left of the center of the traveled portion of the highway and that this negligence was a proximate cause of *P*'s injury. It also found that *P* was not negligent. The supreme court ruled that as a matter of law *D*'s negligence was not a "proximate cause" of the accident. It may be that *P* should have been held negligent as a matter of law, but once it is granted that *D* was negligent in the respect charged, it is difficult to find any justification for the ruling that *D*'s negligence was not a "proximate cause" of the accident. The decision seems to be adopting a "last clear chance" doctrine in favor of the defendant. Wisconsin in the past has not been willing to accept that doctrine in favor of a claimant.⁷³ Although some cases in other jurisdictions seem to have based the "last clear chance" rule upon the

"A driver of an automobile should anticipate that some part of the car may give way at any moment causing a loss of control, and that the serious consequences resulting from such a loss of control are augmented by a high rate of speed. The jury might well have found that if the car had been going at a lawful rate of speed when the wheel came off, the injury would not have occurred, in which case the excessive rate of speed would be the proximate cause of the injury."

⁷² 221 Wis. 280, 267 N.W. 1 (1936).

⁷³ *Switzer v. Detroit Investment Co.*, 188 Wis. 330, 206 N.W. 407 (1925).

law of causation, it is quite generally felt that the doctrine is primarily a device to limit the harshness of the law of contributory negligence. Under the instant case the opposite result is reached. This seems to be a distinct invasion of the spirit of Wisconsin's comparative negligence statute.

The decisions in these cases do not make it clear whether they are based on the theory that the defendant's negligence was not a cause in fact of the plaintiff's injuries or on the theory that it was not a "proximate cause" thereof. It hardly seems fair to say that reasonable men could not have found that there was a causal connection in fact. On the other hand, with negligence and causal relation in fact established, "proximate cause" seems to follow as a matter of course. The rulings of the court should have been completely the reverse of those made. It should have held in each case that the only questions for the jury in this connection were those of negligence and cause in fact, and that as a matter of law "proximate cause" followed an affirmative finding on those issues.