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CAUSATION

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Delivered as the first Harry Shulman Lecture on Torts, an annual lecture established in memory of the late Dean of the Yale Law School.

I cannot speak on this occasion without some emotion.

Harry Shulman was a student under me in the Harvard Law School for four years, taking his degrees of Bachelor of Laws and Doctor of the Science of Law with marked distinction. He was the sort of student whose work is the delight of his teacher's heart. The chief reward of the teacher is in the achievements of his former pupils in their subsequent careers, to which, perhaps, he may be pardoned for thinking he may have in some measure contributed. What Shulman did as lawyer, and teacher, and administrator was all that his teacher had looked forward to. It was fully up to his promise as a student. He grew as a lawyer and law teacher as his teachers had expected of him. He was sure to have done much more had not an unkind fate cut him off in the height of his powers with the prospect of a long and increasingly fruitful career before him. It is a source of pride to have been one of his teachers.

THE PROBLEM

Very likely, one who essays a systematic exposition of causation as an element in legal liability is undertaking what has been described as unscrewing the inscrutable. Dean Green said of causation that it did the work of Aladdin's lamp.[1] Goodhart questioned the "validity of a legal concept which cannot be defined in precise and accurate terms but which must be described by a series of conflicting analogies."[2] The authoritative exposition of the law of torts just put forth from this school says wisely: "Perhaps recent years have seen a little headway made in dispelling the confusion and taking some of the work load off of this weary concept . . . ."[3] But professors of jurisprudence may rush in where lawyers fear to tread.

What has made causation a vexed problem today is the difficulty of achieving a satisfactory balance between the social interest in the general security as a basis of tort liability and the social interest in the individual life as the basis

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1. Green, *Proximate Cause in Texas Negligence Law*, 28 TEXAS L. REV. 471-72 (1950).

2. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 131 n.8 (1931).

3. 2 HARPER & JAMES, TORTS 1109 (1956).

of limitations upon liability. In contrast to the days when men went about in horse-drawn vehicles, reaped with a sickle or a cradle and threshed on a barn floor with a flail, we now travel in streamlined trains, motor vehicles and airplanes at what would have seemed to our grandfathers incredible speed; and accidents from mechanisms out of control, and to some extent beyond ordinary powers of control, are incident to our everyday life in all callings. In the less mechanized society of the fore part of the last century, Bentham put security as the main end to which the legal order should be directed.[4] But the general security, important as it is, is by no means all. If the general security requires pressure upon those in control of the mechanical instrumentalities of danger to life and limb, the economic order calls for a measure of free individual activity, if only to make possible the abundant production demanded for a crowded world with highly specialized individual tasks. Hence liability cannot be extended to the doctrine of article 406 of the Soviet Civil Code or what I have called the doctrine of the involuntary Good Samaritan.[5] There must be a balance. But how is it to be reached?

It cannot be attained by an apparatus of exact rules, attaching definite detailed consequences to definite detailed states of fact, as in the law of property. A basis must be found in principles, in received authoritative starting points for legal reasoning.

I had thought at one time of deducing a principle or principles of limitation from the jural postulates of life in the society of today. Postulates from which we deduce liability might be put thus:

First, men must be able to assume that others will commit no intentional aggression upon them. Hence, one who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can justify his act under some social or public interest, or assert a privilege because of a countervailing interest of his own which there is a social or public interest in securing.

Second, men must be able to assume that others will act reasonably and prudently, so as not by want of care to impose upon them an unreasonable risk of injury. But what is the measure of the reasonable in this connection and how shall we fix the ambit of the risk which creates liability?

Third, men must be able to assume that others who maintain things or employ agencies harmless in the sphere of their use but potentially harmful in their normal action elsewhere, and having a natural tendency to cross the boundaries of their proper use, will restrain them or keep them within their proper bounds.

It should be noted that limitations are implicit in each postulate: possibility of justification in the first, a reasonably fixed ambit of the created risk in the second and control and boundaries of proper use in the third.

4. BENTHAM, PRINCIPLES OF LEGISLATION tit. 1, c. 7 (new ed. 1931).

5. *Cf.* Lord Bramwell's story of the pickpocket who having heard the charity sermon was so moved by the preacher's eloquence that he picked the pockets of everyone in reach and put the contents in the plate.

Theories of limitation of liability have taken the form of theories of causation. Can we formulate a postulate behind limitation of liability under the three postulates? Many seek to do this by principles of valuing under ethical ideas of value. The doctrine of the last century sought to do it by making liability depend upon an idea of fault—of moral blameworthiness. The law of the last century sought to do it by exceptions to liability for fault "based upon public policy."[6] But public policy was here a limitation of application of the postulate of liability by balance of an undefined social interest in economic activity of the person sought to be held. Hence, I prefer to approach the problem in another way.

William James tells us of the struggle to find the more inclusive order.[7] Shall we say, as to juristic thinking, the more inclusive idea? Etymologically, idea means picture—a mental picture. So jurists seek the more inclusive mental picture of what they seek to do and how to do it. What, then, is the idea from which to start in solving the problems of the science of law? Increasingly I have come to think that the more inclusive idea—the picture which can tell us most of what we have to do in the administration of justice and how we are to do it—is the idea of civilization: the idea of raising human powers to their highest development. The fashionable Neo-Kantian sociological and juristic thinking of today takes the more inclusive idea to be justice. But what is the idea of justice? The leading philosophical jurist of the time put it as the ideal relation among men.[8] We are to begin with a picture of that ideal relation. It cannot be a picture of an abstract man in an abstract world. Must it not be one of the ideal relation among men of this age in the concrete world in which we find ourselves, a crowded world of men living in politically organized societies in a time of highly mechanized activities of every sort on every hand, as Milton put it, "with dangers compassed round," a world of men seeking to realize their expectations both by individual exercise of their natural faculties and by cooperative effort? The condition in which they are able to do this we call civilization. Let us start, then, with that idea.

Fifty years ago, the dominant picture was drawn from the Darwinian struggle for existence. We all want the earth and the fullness thereof. There is but one earth and myriads of individuals are competing for it, or at least for so much as they can get and hold of what Spencer termed the natural media of existence. Today, professors of the physical sciences are prophesying a world in which no such competition will exist. Professor Soddy of Oxford has told us that science is so multiplying abundance that there is to be in no distant future all that anyone can want.[9] But as this abundance multiplies, men's wants and expectations may multiply correspondingly; and, in any event, if nature is to be made to provide fruits inexhaustibly, there will be tasks of picking them and transporting them, and no two can use the same single item at

6. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908).
7. JAMES, THE WILL TO BELIEVE 195-206 (1911).
8. RADBRUCH, RECHTSPHILOSOPHIE (4th ed. 1950).
9. SODDY, THE INTERPRETATION OF RADIUM 5-6 (4th ed. 1920).

the same time. At any rate, pending the arrival of the professor's economic Utopia, we shall continue to have tasks of ordering satisfaction of infinite human wants and expectations out of a finite stock of the goods of existence. The condition in which this ordering has developed and made for increasing production and increasing use of what is produced we call civilization.

Civilization has two sides: the mastery of external or physical nature and the mastery of internal or human nature. Mastery of external nature has been carried so far and is being carried continually so much further in our generation as to realize the biblical prophecy of inheriting the earth. But this mastery has been achieved only through mastery of internal nature which has made possible devotion of individual activity and energy to increasingly specialized cooperative production and the research, experimentation and study which have given increased knowledge of the materials and forces of physical nature and how to use and control them.

This mastery over internal nature is achieved and maintained through social control, by the pressure upon each man by his fellow men to do his part in upholding civilized society and to deter him from antisocial conduct, that is, conduct at variance with the postulates of the social order. The major agencies of social control are religion, morals and law. In the modern world, law has become the paramount agency of social control. Our main reliance in the society of today is upon the force of politically organized society. We seek to adjust relations and order conduct through the systematic and orderly application of that force.

This long exordium has seemed worth while as the foundation of a philosophical theory of one of the debated problems of that part of the law by which we seek to uphold the general security—to give effect to the claim or want or demand asserted in title of social life in civilized society and through the social group, to be secure against those forms of action and courses of conduct which threaten its existence, and particularly in the law of torts, that form which threatens the general safety. Along with this we have to consider in the law of torts, in the theory of legal liability, the social interest in the individual life —the claim or want or demand involved in social life in civilized society that each individual be able to live a human life therein according to the standards of the society. Furthermore, the economic order depends upon the productive activity of individuals as well as upon their safety. Hence, liability imposed to secure safety of life and limb must be limited with respect to free individual productive and socially useful activity. Accordingly, we must seek a balance of the general security and the individual life and develop liability and limitation of liability in a workable theory. This balance has been sought in theories of causation.

The General Theory of Liability in the Law of Today

In the general theory of tort liability in the law of today, liability to repair injury is imposed to secure against intentional aggression, to secure against imposition of unreasonable risk upon others under the conditions of life in the

time and place and to secure against the operation of agencies and instrumentalities of danger to others correlative to power to control them.

Intentional aggression is the threat to the general security in a simple agricultural society. Thus, Roman law and the common law began with a series of named torts. In Roman law there were: *iniuria,* intentional injury to the physical person or to honor; *furtum* and *rapina,* wrongful appropriation of property; and *damnum iniuria datum,* injury to corporeal property. In the common law there were: assault and battery, false imprisonment, trespass upon possession of land or of chattels, conversion of chattels, and later, defamation. These named torts set a pattern for types of injury which became important. They raised little or no questions as to balancing of interests or limitations of liability except in defamation, which was taken over by the common-law courts from the ecclesiastical courts and, later, the Star Chamber. How completely these named torts shaped thinking about negligence at the outset of legal consideration of that subject is illustrated by the seventeenth century treatment of negligent wounding by discharge of a musket during military drill as a battery in the well-known case of *Weaver v. Ward,*[10] and by the insistence on a procedural distinction between direct and indirect injury—between trespass and case—in the books as late as the end of the nineteenth century.[11]

Development of urban industrial society makes intentional aggression less common and less significant, and the chief threat to the general security comes to be in the way men do things—in their carrying on items of their daily activities so as, without intentionally harming others, to subject them to an unreasonable risk of injury from which harm results to some one. Here belong, in Roman law, Aquilian *culpa,* culpable injury to person or property, in the common law, negligence. As to these grounds of liability, a question of relation of the injury complained of to the risk created becomes important, and the need of limitation in view of the economic importance of free individual activity and the social interest in the individual life of the person to be charged leads to theories of causation.

In recent times, chiefly in the last third of the nineteenth century and increasingly in the present century because of increased industrialization and mechanization of everyday activities and everyday furniture, letting instrumentalities of danger get out of hand and do injury has become the most serious threat to the general security, has brought about the most and most serious injuries to life and limb and has required overhauling of liability in all systems of law.

Just as the development of the law of negligence was hampered by ideas brought over from the law of intentional aggression, the law as to injuries incurred has had a struggle to throw off ideas developed in the older law of negligence. As development of the law of negligence required a more inclusive

10. Hob. 134, 80 Eng. Rep. 284 (K.B. 1617).

11. And, indeed, in the present century, in BOHLEN, TORTS 1-93, 177-298 (1915).

idea than was given by the analogy of trespass and led to the fault theory of liability, which could include both the named torts and negligence, today we have once more to seek a more inclusive idea which will include the named torts, negligence and what is often called strict liability by analogy to certain survivals from liability as a substitute for subjection to private vengeance in the beginning of the legal order.

The Fault Theory of Liability

At this point, an excursus is required with respect to the fault theory of liability. Development of a significant law of negligence begins in the seventeenth century. That was the era of the law-of-nature school of jurists who held that reason could furnish a complete apparatus of rules of law good for all times and places and men. The Latin word *jus* was too inclusive, meaning what was right, a right and law. So it is in the language of Continental Europe today. One word has to serve for the three ideas. In English, we are a bit better off. We have right—what is right—and law. But English juristic thinking was influenced from the Continent. What was right was law. Thus, what reason pointed out as right was law because it was right. Rules of law were applications of moral or ethical propositions of incontestable universal validity —not mere practical adjustings of conflicting or overlapping claims and expectations adapted to the time and place, worked out and tested by experience. There was a good side to this identification of the legal with the moral. The attempt to make law and morals identical by laying down legal precepts to cover the whole field of morals and to conform existing established legal precepts to the requirements of a reasoned system of morals made the modern law. But in the eighteenth century the creative energy of the law-of-nature doctrine was spent. Instead of using "what ought to be" to establish "what is," jurists came to consider "what is" an authoritative pronouncement on what ought to be—the law they found in the books was declaratory of the law of nature. Where the analytical jurist of the late nineteenth century, to use Holmes' phrase, washed the starting points for legal reasoning in cynical acid, the philosophical jurist of the eighteenth and fore part of the nineteenth century sought and gave plausible reasons for them as he found them. Formulation of principles, that is of authoritative starting points for legal reasoning, as universally valid moral propositions became the accepted method of the science of law. In America we received the common law as expounded by Coke and Blackstone and the science of law as expressed in terms of the law-of-nature philosophy by Blackstone.

Both in the law of Continental Europe and in Anglo-American law the principle of liability accepted in the nineteenth century speaks from the eighteenth century law of nature. It is a moral proposition found by reasoning. The classical statement of the principle is article 1382 of the French Civil Code: "Every act of one which causes damage to another obliges him through whose fault it has happened to repair it." Thus there are two elements of liability: fault and causation. Liability followed from culpable causation of damage.

Under this theory of liability, fault was taken to be moral fault. It was an ethical theory, appropriate to the era of the development of equity in Anglo-American law, the time when under the leadership of Lord Mansfield the common-law courts took over from Chancery the idea of restitution to prevent unjust enrichment and made the common counts a bill in equity at law. In consequence fault liability became encumbered with limitations derived from what has been called technical equity. One who sought the aid of a court of equity had to come into equity with clean hands. He could not urge his claim in the court if his conduct in the transaction or situation out of which his claim arose was against equity and good conscience. In the same way, if he sought restitution to prevent unjust enrichment, he could not recover if he was *in pari delicto* with the defendant who extorted money from him. Accordingly, if he was one of a number of persons acting each for himself who cast an unreasonable risk of injury on another to his damage, and the latter sued one of them and recovered a judgment which he had to pay, the whole loss fell upon him. Contribution was an equitable remedy. There was no contribution among wrongdoers. Likewise, if *A* was seriously injured through *B*'s negligence, but *A* contributed to the injury by his own negligence, his contributory negligence was a complete bar. He himself was also a wrongdoer. In all this, the common-law courts were treating liability for negligence on the analogy of the old named torts of intentional aggression. A tortfeasor was a wrongdoer. He was sued *ex delicto*. In a moral system of rules of law proceeding from principles of morals and developed as applied ethics, a wrongdoer had no place as a claimant for relief. That one person was thus made to bear the whole loss although more than one had been culpable was not considered. Law was a body of rules. As an abstract moral proposition, a wrongdoer had no claim to be helped. The moral legal system could thus be made to yield some unmoral concrete results.

The Roman law and the civil law derived from it developed a doctrine of what we now call comparative negligence. The total loss was to be borne by the negligent actors in the situation in proportion to their fault. This was also the doctrine of admiralty which here, as in so many connections, followed the Roman law. Comparative negligence is now superseding contributory negligence by legislation throughout the common-law world. The injustice of casting on one person the whole burden of loss in the accidents which are everyday incidents of life in the crowded, thoroughly mechanized world of today has become obvious. Legislation has been rejecting the rule of no contribution among tortfeasors. The idea of negligence as moral fault was given up in Continental Europe a generation ago, and limitations of liability to cases of intentional aggression and negligence began to crumble in the last third of the nineteenth century. In addition, new theories developed to cover intentional aggression, negligence and so-called strict liability are being urged. *Culpa* causation as a general principle has been pretty well given up. But causation has hung on, partly because of long general acceptance of Bacon's maxim and more justifiably because the balance of the general security and the individual life requires some limitation of liability, and the rule requiring proximate causation of damage appeared to supply the need.

TECHNICAL DEVELOPMENT OF THEORY OF CAUSATION

What we have to consider, then, is the technical development of the doctrine of proximate cause in the nineteenth century; what it is, and what we can find or develop to replace it.

As to what the doctrine is, Sir Percy Winfield says justly: "[A]ny student who expects a scientific analysis of causation will be grievously disappointed. Up to a certain point the common law does touch upon metaphysics. But no test of remoteness of causation . . . would satisfy any metaphysician. On the other hand, no test suggested by metaphysicians would be of any practical use to lawyers."[12] Nor have the lawyers been able to work out a test satisfactory to themselves as the enormous bulk of controversial literature on the subject abundantly illustrates.[13]

Causation appears first in the English cases in the seventeenth century[14] in terms of the Aristotelian scholastic logic which distinguished *causa causans* and *causa causati*—the causing cause and the cause of the effect.[15] To give a present-day illustration, if *A* parks his car in the road in order to put on a tire, and *B* drives another car on the wrong side of the road and runs into *A*'s car which is started up and injures *A*, *A*'s negligent parking in the road was a *causa causati*. *B*'s negligent driving on the wrong side of the road was a *causa causans*. Later we read that "he that does the first wrong shall answer for all consequential damages."[16] To the same effect is what was said in the celebrated "squib case."[17] But there the one who first threw the lighted squib into the market-house cast an unreasonable risk of injury on those inside, while those who impulsively threw it off their stalls in self-defense, if the case was treated on the analogy of intentional aggression, had a privilege of self-defense. Next we hear of the "legal and natural consequences" of the wrongful act.[18] Here, too, the court is thinking on the analogy of battery. The word "proximate" comes in later in the phrase "natural and proximate consequence."[19] By this time, negligence was ceasing to be treated on the analogy of intentional aggression; but a theory of negligence was at most formative. Successive negligences concurrently contributing to the result led to comparison of *causa causans* with *causa causati*. Since under the legal procedure of that time defendants could only be joined in the action when they had acted jointly, it became necessary to think who was to be held in case of concurrent causation by independent

12. WINFIELD, TORTS 64 (4th ed. 1948).

13. See the bibliography in 2 HARPER & JAMES, TORTS 1109 n.4 (1956).

14. Earl of Shrewsbury's Case, 9 Coke 46b, 77 Eng. Rep. 798 (K.B. 1610).

15. The action was trespass *vi et armis* for disturbing the steward of certain manors in the exercise of his office. *Id.* at 50b, 77 Eng. Rep. at 806.

16. Roswell v. Prior, 12 Mod. 635, 639, 88 Eng. Rep. 1570, 1573 (K.B. 1701). Here a nuisance was created by a lessee and continued by his assignee. The assignor was held liable in an action on the case.

17. Scott v. Shepherd, 2 W. Bl. 892, 899, 96 Eng. Rep. 525, 528 (K.B. 1773).

18. Vicars v. Wilcocks, 8 East. 1, 3, 103 Eng. Rep. 244, 245 (K.B. 1806).

19. Ward v. Weeks, 7 Bing. 211, 212, 131 Eng. Rep. 81, 82 (C.P. 1830).

negligences. Greenleaf said that in case of injuries to the person the damages recoverable must be confined to the natural results of the efficient cause.[20]

"Natural and proximate cause" seems to come from one of Bacon's maxims joined to the phrase in *Ward v. Weeks*.[21] Bacon's first maxim reads: *"In jure non remota causa, sed proxima spectatur."* He expounds thus: "It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree."[22] Of the sixteen cases discussed by Bacon in support of his maxim, none has to do with liability for negligence. One has to do with fraud, and there he says "the rule faileth." Another has to do with crime, and he tells us that "the rule holdeth not in criminal acts."[23]

Bacon's maxim was given currency by Broom's *Legal Maxims*. It is noteworthy that in the first edition Broom put the two exceptions noted by Bacon and as application of the maxim referred only to cases of insurance.[24] Other applications were added in successive editions until in the current edition there has come to be a long discussion of the maxim's application to negligence.[25] So far as Professor Beale could find,[26] and I have tried in vain to find it earlier, the maxim was first used in America in a case in Pennsylvania in 1863.[27] It was evidently taken from Broom's *Maxims* which had been reprinted in *The Law Library*, a series of reprints of English law books published in Philadelphia from 1830 to 1860. The phrase "natural and proximate" came into general use in the United States in the last quarter of the nineteenth century, given currency by Cooley.[28] The book in common use before Cooley spoke only of the natural and usual consequences.[29]

It will be noted that the maxim as applied to negligence first assumes the search for one defendant unless there was joint action or conduct, second goes on the analogy of the named torts of intentional aggression and so, third, does not think of negligence as the imposing of an unreasonable risk on others and thus a threat to the general security. Even on those assumptions the maxim was quite misleading. Unless as a matter of convenience, to save the trouble of search for the efficient cause in a complicated case, since Bacon had pointed out that it would be "infinite to consider the causes of causes," no good reason could be given for putting the whole burden of liability upon one chargeable with the last in point of time. As had been said in a case often cited: "The

20. 2 GREENLEAF, EVIDENCE § 268 (1st ed. 1846).
21. 7 Bing. 211, 212, 131 Eng. Rep. 81, 82 (C.P. 1830).
22. BACON, MAXIMS OF THE LAW 1 (1630); 7 SPEDDING, WORKS OF FRANCIS BACON 327 (new ed. 1879).
23. 7 *id.* at 327-30.
24. BROOM, LEGAL MAXIMS 165-71 (1st ed. 1845).
25. *Id.* at 144-46 (10th ed. 1939).
26. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 635 (1920).
27. Scott v. Hunter, 46 Pa. 192 (1863).
28. COOLEY, TORTS 69-71 (1880).
29. ADDISON, TORTS 6 (1st ed. 1870).

reasonable inquiry . . . is not which is nearest in place or time, but whether one is not the efficient producing cause, and the others but incidental."[30]

In England two views came to be urged. One was the doctrine announced in the leading English text on negligence. It was that in establishing liability there were two questions to be put: "First, an inquiry whether the act causing the injury was wrongful; that being established, then, what are the actual continuous consequences of the wrongful act? The liability is determined by looking *a post*, not *ab ante*. The defendant's view of the possibilities of his act is very material to determine whether his act is negligence or not; it is utterly immaterial to limit liability when once liability has been established."[31]

A number of points in this statement are noteworthy. It goes on the theory of liability in the French Civil Code. It suggests that there may be a question of limitation of liability for negligence. And it challenges the assumed need of confining liability to some one person in case there is not joint action.

Beven founded this proposition on an opinion by Blackburn, J., as he then was, in 1870.[32] His doctrine was followed in America by Street[33] and by Bohlen.[34]

On the other hand, Sir Frederick Pollock questioned the dicta in *Smith v. London & S.W. Ry.*[35] and later developed his criticism of that case and criticized Beven's doctrine which was based upon it.[36] Pollock held there was only one question in negligence cases, not two. As he put it, the accepted test of liability for negligence in the first instance was also the proper measure of liability for the consequences of proved or admitted fault.

But as late as 1907 English courts were saying: *"Causa proxima non remota spectatur."*[37]

In the United States, the subject of causation was first fully and critically explored by Judge Jeremiah Smith in 1911-12.[38] His conclusion, not generally accepted at first, has proved to be a contribution of the first importance. As he stated it, the problem was: "What constitutes such a relation of cause and effect (such a causal relation) between defendant's tort and plaintiff's damage as is sufficient to maintain an action of tort?" He put his conclusion as a general rule thus: "Defendant's tort must have been a substantial factor in producing the damage complained of." Or, he says, putting it more fully: "To constitute such causal relation between defendant's tort and plaintiff's damage as will suffice to maintain an action of tort, the defendant's tort must have been a substantial factor in producing the damage complained of."[39]

30. Shaw, C.J., in Marble v. Worcester, 70 Mass. (4 Gray) 395, 409 (1855).
31. 1 BEVEN, NEGLIGENCE 89 n.2 (3d ed. 1908).
32. Smith v. London & S.W. Ry., L.R. 6 C.P. 14, 21-22 (1870).
33. STREET, FOUNDATIONS OF LEGAL LIABILITY 91 (1906).
34. BOHLEN, TORTS 8 n.15 (1926).
35. POLLOCK, TORTS 369-71 (1st ed. 1887).
36. Pollock, *Liability for Consequences*, 38 L.Q. REV. 165 (1922).
37. Hadwell v. Righton, [1907] 2 K.B. 345, 348.
38. Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 223, 303 (1911-12).
39. *Id.* at 309-10.

The next thoroughgoing study was made by Professor Beale. He argued that, in order to hold a defendant liable for injury suffered, the force he set in motion or situation he created "must (a) have remained active itself or created another force until it directly caused the result; or (b) have created a new active risk of being acted upon by the active force that created the result."[40] This proposition was directed to a doctrine of what was called insulation of the negligence of one by the supervening active creation of a new risk by another which had the result of immediately causing the harm complained of. The doctrine got its name from the cutting off or separation of conducting bodies by non-conducting bodies so as to prevent transmission of electricity—a strained analogy which has done ill service to the law.

Professor McLaughlin argued that "the man who 'starts something' should be responsible for what he has started" and that the something is "an active force continuously producing change."[41]

Dean Leon Green, in an illuminating paper argued "that in any given case the inquiry is not directed toward discovering *the* cause of the damage, but is whether defendant's conduct was *a* cause of the damage." Hence "the consideration of other cause factors is incidental and only material on two points: *first*, whether the part played by any other cause factor is a hazard for which *defendant* should be held; and, *second*, whether in the light of all the other factors the defendant's conduct played an *appreciable* part in the result."[42] If it is a cause, it is not to be "insulated" by another's wrongdoing. If it creates a risk, what is the ambit of that risk?

Green says that, under this approach, it is for the judge "to say whether the risk encountered is one which the rule was designed to protect against. This requires the broadest survey of policies. It restrains the judge from shifting this most important problem to a jury as has been done time and time again under the farcical term 'proximate cause.'" He argues that it restricts the jury to the province of fact finding but insists that the judge give the proper respect due such high function by not invading the province himself. Again, he argues the judicial function is required to operate scientifically by consciously fashioning the law in view of the numerous factors involved "instead of resting the fashioning of law on a game of chance with a single factor always the 'trump.'"[43]

This recognition that we are searching for the ambit of the risk created was a real step forward. Today, as joinder of independent wrongdoers and contribution among tortfeasors are possible, determination of the ambit of each of a number of negligences relieves the law of much of the difficult balancing of interests which gave pause when the whole loss had to fall upon one of the tortfeasors or else upon the person injured.

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40. Beale, *supra* note 26, at 658.

41. McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 164 (1925). This is the idea of the squib case, Scott v. Shepherd, 2 W. Bl. 892, 96 Eng. Rep. 525 (K.B. 1773), and the old cases arguing as to *causa causati*.

42. GREEN, RATIONALE OF PROXIMATE CAUSE 134 (1927).

43. *Id.* at 200.

Professor, now Judge, Edgerton reviewing the much discussed case of *Smith v. London & S.W. Ry.* considered the effect of "slight chance of harm."[44] This, as will be seen later, ties in with the ambit of the risk. In Roman law, the *ambitus parietis* was a space of one and one half feet around a house which was required to be left vacant. So ambit came to mean bounds, limits or extent. So ambit of the risk means the limits or extent of the risk created by conduct not had with due care. Judge Edgerton's argument for leaving the ambit of the risk in doubtful cases to the jury deserves more consideration than it has received. There is something to be said for this as a matter for which the common sense of a jury could be useful.

Sir Percy Winfield stated, as the result of the English cases down to 1948: "A consequence is not too remote if it is direct. (2) The meaning of 'direct' is this: (i) Where physical consequences result from negligence, they are not necessarily indirect because a reasonable man would not have foreseen them. 'Physical' seems to mean consequences likely to ensue in accordance with the scientific laws known to govern the world, irrespective of whether a reasonable man would have foreseen such consequences. (ii) Subject to (i) the criterion of 'directness' is, 'Would a reasonable man have foreseen the consequences?' "[45]

It will be seen that there remains only the ghost of Bacon's maxim in calling a test of directness a test of remoteness. Also, Beven's twofold exposition of liability as depending on whether the defendant's conduct was wrongful and whether the injury was a continuous consequence of that conduct, founded on Blackburn's exposition in *Smith v. London & S.W. Ry.*, is given up, and Pollock's view that there is but one question is adopted.

Some American courts have worked out what is called the "but for" rule: "The defendant's conduct is not a cause of the event if the event would have occurred without it."[46] This was considered by Judge Smith and Professor McLaughlin in their papers referred to above.[47] It will not explain the cases of concurrent negligence to be dealt with later.

In 1920 the Supreme Court of Minnesota took as a criterion the test suggested by Judge Jeremiah Smith in 1911: the defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about.[48] This was developed in the American Law Institute's *Restatement of the Law of Torts.*[49] Part of the comment on this statement is worth quoting: "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

44. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 343 (1924).
45. WINFIELD, TORTS 71-72 (4th ed. 1948).
46. See PROSSER, TORTS 220-21 (2d ed. 1955).
47. See notes 38, 41 *supra.*
48. Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 146 Minn. 430, 179 N.W. 45 (1920).
49. RESTATEMENT, TORTS § 431 (1934).

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. Each of these events is a cause in the so-called 'philosophic' sense, yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes." What this comes to is that the events may not in themselves have been serious threats to the general security. This is the real point when we think of negligence as imposition of a risk which is a threat to the general security and the ambit of the risk as determined by the extent and seriousness of the threat. Bacon's difficulty in that the causes of causes and their impulsions one of another are infinite disappears when we get away from the analogy of torts of aggression and think in terms of what William James would call the more inclusive order of threats to the general security.

All that has been said as to causation as a ground of liability, following the idea formulated in the French Civil Code, must be reconsidered today in the light of the present-day concept of negligence as the casting or imposing of an unreasonable risk of injury upon others and in that way threatening the general security.

This is what the *Restatement of the Law of Torts* was feeling for in the definition in section 282: "In the Restatement of this subject, negligence is any conduct, except conduct recklessly disregardful of an interest of others [which is taken to amount to aggression], which falls below the standard established by law for the protection of others against unreasonable risk of harm." The doctrinal writers of the civil law have been coming to the same result.[50]

The problem of causation, then, is one of ascertaining the ambit of the risk created by the defendant as determined by the gravity of the threat to the general security.

But if, as has often been said, foreseeability is hard to define with respect to particular cases, it may be asked if we are better off in asking about the ambit of the risk created, as fixed by the gravity of the threat to the general security. Application of such standards as reasonableness, foreseeability, gravity of the threat is never easy in marginal cases, but we can't give it up in deference to Mr. Dooley's judge who could not think outside of a hammock. One of these standards is no easier of application than another, and the merit of the test of gravity or seriousness of the threat to the general security is that it relates the quest immediately to the purpose of the law. I submit that the test of the ambit of the risk is the degree of threat to the general security, under the conditions of today, in what the defendant did or how he was doing it.

This is brought out in two recent cases: the *Polemis* case in England and the *Palsgraf* case in New York. These two cases have been much discussed

50. 2 PLANIOL & RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL Nos. 863, 869 (11th ed. 1931); ENDEMANN, LEHRBUCH DES BÜRGERLICHEN RECHTS § 129 (9th ed. 1903); RÜMELIN, M., VERWENDUNG DER CAUSALBEGRIFFE IN STRAF—UND CIVILRECHT (1900); MORTON, VERSCHULDUNGSPRINZIP, VERURSACHUNGSPRINZIP (1926).

and have often been regarded as in conflict.[51] Tested by the criterion I have submitted, they were each rightly decided and are not out of accord.

In the *Polemis* case,[52] a workman employed by defendants dropped a plank in the hold of the plaintiff's ship and thereby caused an explosion of gasoline vapor which destroyed the ship. It was found that the workman could not have anticipated the explosion but should have foreseen other possible injury. The Court of Appeal held the defendant liable even though the damage could not have been foreseen.

In the *Palsgraf* case,[53] a man carrying a small package sought to board a car on a moving suburban train but seemed unsteady as if about to fall. A guard on the car who had held the door open reached forward to help him in, and another guard on the platform pushed him from behind. The package was dislodged and fell upon the rails. It contained fireworks which exploded, and the shock of the explosion threw down some scales at the other end of the platform many feet away; the plaintiff was struck by a flying weight and injured. The package was covered by a newspaper and there was nothing about it to indicate that it contained anything more than some ordinary small purchase. There was judgment for the plaintiff in the trial court which was affirmed by the Appellate Division but reversed in the Court of Appeals by a divided court, three of the seven judges who sat dissenting. The opinion of the majority was written by Chief Judge Cardozo, afterward one of the Justices of the Supreme Court of the United States. The dissenting opinion was written by Judge Andrews.

These two cases are entirely reconcilable by the test I have proposed, and each is right in result, whatever differences may appear in the reasoning of the judges about causation. To drop a heavy plank into the hold of a big ship—valued at about one million dollars—is in itself a grave threat to the general security. Almost anything or any person might be struck with serious results. There was no question of balance of the social interest in the individual life with the social interest in the general security. The employee was doing his employer's work. He was not doing anything which he should have been especially protected in doing or encouraged in doing. On the other hand, in helping the passenger get on the car, the guards were doing nothing that threatened the general security; nor was there any serious threat to the general security in the way they did it. If there was danger that the package would be dropped, that in itself threatened no more than loss of a small parcel of merchandise. The guards were doing what common humanity and their duty toward their employer impelled them to do, and the social interest in the individual life—in their individual freedom of action—should be weighed against any threat to the general security, which with respect to the plaintiff was very slight. The intuitions of courts derived from experience are sometimes better than their reasoning.

51. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 120-50 (1931).
52. *In re* Polemis, [1921] 3 K.B. 560 (C.A.).
53. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

CAUSATION AND CONCURRENT NEGLIGENCE

What I have argued is borne out by the cases of concurrent negligence, a subject long embarrassed by the supposed necessity of finding the one culpable actor, the rule against contribution among tortfeasors threatening to throw the whole loss unfairly upon one of a number of wrongdoers and the doctrine of insulation by the independent act of another as a means of mitigation.

Four recent cases will suffice to make the point. *Carpini v. Pittsburgh & Wierton Bus Co.*[54] was an action by injured passengers against the Bus Company and General Motors, maker of a bus operated by the Bus Company. The bus, which had a seating capacity of thirty-eight, was carrying fifty-nine passengers and had given trouble with its brakes on an earlier trip. It was driven negligently down a steep hill on a road covered with rocks and debris after a severe storm. The makers of the bus were found negligent in the design of the bus in that the petcocks to drain the air chambers were left unprotected and so low to the ground as to be likely to be broken by such things as a stone on the highway and so let the air escape and cause the braking system to fail. After the accident, it was found that a petcock on the bus was broken off. While the bus was going down the hill, the braking power failed, the driver lost control and the bus crashed into a wall and was wrecked. Eleven persons were killed and forty-nine were injured. The main controversy was between the two defendants. Each claimed that the other was responsible. There was a verdict against both and judgment against both was affirmed.

In *Langston v. Moseley*,[55] the first defendant, having driven part way across an intersection, saw that the red light signal was against him, stopped and backed, and in so doing drove against and under the bumper of the second defendant, locking the bumpers. While the two were endeavoring to disengage the cars, they called on the plaintiff to help them and one told the plaintiff to get up on the bumpers to shake them, assuring him that there was no danger, but, as the jury found, doing nothing to warn him of the coming of other cars. While this was going on, the third defendant, driving on the wrong side of the street, hit the first defendant's car, and the impact knocked the plaintiff to the pavement injuring him. The jury found for the plaintiff, there was judgment against all three defendants, and the first defendant appealed. The judgment was affirmed.

In *Noel v. Menninger Foundation*,[56] plaintiff, a mental patient in a hospital, was permitted by an attendant to go upon a heavily traveled highway, continually used by fast-moving traffic, when his mental condition was such that he was unable to understand the danger. He was struck and seriously injured by a truck negligently driven by the driver of a co-defendant. The trial court sustained a demurrer. The Supreme Court reversed a judgment in favor of the hospital and remanded the case with instructions to overrule the demurrer.

54. 216 F.2d 404 (3d Cir. 1954).
55. 223 Ark. 250, 265 S.W.2d 697 (1954).
56. 175 Kan. 751, 267 P.2d 934 (1954).

Yandell v. National Fireproofing Corp.[57] was an action by an employee of the consignee against the consignor, the initial carrier, intermediate carriers, the delivering carrier and an employee of the delivering carrier for injuries incurred while unloading the contents of a defective and negligently loaded boxcar. Judgment for the plaintiff upon overruling of demurrers by the several defendants was affirmed.

In *Carpini* we find a clear and emphatic statement by a strong court against the fallacious proposition that injuries in such cases are to be attributed exclusively to the last actor as the "proximate" cause. Here, General Motors negligently set the stage which subjected the plaintiff, as one of those who might reasonably be expected to ride in the bus, to an unreasonable risk of injury. The Bus Company, acting negligently on the set stage, subjected the passengers to a serious risk of injury by sending out a bus the brakes of which had been acting badly, grossly overloading it and driving it down a steep hill at a high speed. The injury was caused by risks operating concurrently to which the plaintiff was unreasonably subjected by each defendant independently. Concurrent negligence is negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence in producing a single indivisible injury. In this case, the threat to the general security in the risk created by each defendant was very serious, as shown by the great number of persons killed and injured.

Langston has to do with three of the ideas I have been discussing. The majority of the court held that a person responsible for only one of several causes combining to produce injury is liable if, without his negligent act or conduct, injury would not have happened. It is the "but for" rule suggested by Judge Jeremiah Smith. The dissenting opinion asserts that the majority goes on an erroneous proposition that the negligence of the first and of the third defendants were both concurrent and efficient. That is, the negligence of the third defendant was "the last proximate cause," and the injury is to be imputed to that. This is the "insulation" or breaking the chain of causation theory which is disappearing from the books and has no foundation in the purpose of the legal order. In this case, the first and second defendants negligently set the stage subjecting the plaintiff and others who might come along upon the highway to a grave, unreasonable risk of injury. The third defendant, acting negligently on the set stage and by driving on the wrong side of the road making a serious threat to the general security, did plaintiff the injury to risk of which the first and second defendants had unreasonably subjected him. The case was so decided as to accord with the sound rule. There can be concurrent tortfeasors even if they are not acting jointly. One injury here was caused by grave risks to which the plaintiff was subjected independently and unreasonably by each defendant.

In *Noel* the hospital—hospitals have no immunity in Kansas—negligently set a perilous stage, and the co-defendants came along and acted on it negli-

57. 239 N.C. 1, 79 S.E.2d 223 (1953).

gently. Formerly, it would have been said that the negligence of the driver of the truck was the proximate cause of the resulting accident. But here, while each defendant independently subjected the plaintiff to an unreasonable risk of injury, the plaintiff was at the same time injured in one event while in the ambit of each risk. Allowing the demented plaintiff to be unattended on a busy highway where motor traffic was passing and repassing continuously was a grave threat to the general security. Driving a truck carelessly on such highway was a threat no less grave. As the plaintiff's injury was in the ambit of each risk when it occurred, there was concurring negligence.

In *Yandell* each of the defendants held liable imposed an unreasonable risk upon every one, who, as many were bound to, had occasion to come in contact with the negligently loaded, uninspected, defective boxcar. There was a grave threat to the general security along the whole line. The plaintiff was injured in the ambit of the risk created by the concurring negligence which resulted in producing the one injury.

To revert to an observation of Judge Smith,[58] putting on the market motor buses with braking apparatus liable to fail, careless driving of an overloaded passenger bus, careless driving of motor vehicles on much traveled highways, failure to attend demented patients and allowing them to go at large upon crowded thoroughfares, putting defective cars on trains going on long journeys through many states, carelessly loading them, and leaving them uninspected to endanger many workers on their journey to their destination, make such threats to the general security under the conditions of life today that courts are giving up the quest of determining how and when to exempt tortfeasors from liability for effects which were really caused by their torts.

One might add that the recent decisions as to concurring negligence fit well with the prevailing doctrine of spreading the loss. It may be spread by contribution among those whose negligence concurred in causing the injury.

Instead of the figurative expression insulation of a defendant's negligence, the American Law Institute's *Restatement of the Law of Torts*[59] speaks of a superseding negligence. The negligence of the defendant is said to be superseded by the supervening negligence of a third party when his act or conduct is not "extraordinarily negligent." This is the sound criterion if by "extraordinary" we mean a more than ordinary threat to the general security in the risk created. Should there be a different rule, however, if the resulting injury was not to a third person but to the supervening actor? Such a situation is suggested by a recent case in Pennsylvania.[60] If negligence of a plaintiff contributing in any degree to the result is an absolute bar, perhaps there must. However, what is called the plaintiff's husband's supervening negligence in the Pennsylvania case seems from the facts set forth in the opinion of the court to have been rather inability to deal adequately under the circumstances with

58. Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911).
59. RESTATEMENT, TORTS § 447 (1934).
60. Listino v. Union Paving Co., 386 Pa. 32, 124 A.2d 83 (1956).

a difficult situation caused by the very serious risk and threat to the general security created by the defendant. Had the husband been permitted to sue, the case would be one for comparative negligence wherever that just substitute for the absolute bar of contributory negligence obtains.

Finally, have we not in this story of theories of causation in the law of torts a significant point in the perennial controversy as to codification? If the Anglo-American law of torts had been codified one hundred years ago, liability would have been tied to the idea of fault and the analogy of aggression. If it had been codified at the beginning of the present century, liability would have been tied to the idea of proximate cause. The advent of motor vehicles, air transportation, high voltage power wires and electric apparatus in the home have given experience of multiplied risks which threaten the general security and to which those ideas are inadequate. An uncodified law able to develop experience by reason and test reason by experience is proving to make our law of torts equal to its tasks by working out principles—starting points for reasoning—in the orderly course of judicial decision.